

No. 14842

United States
Court of Appeals
for the Ninth Circuit

FISHER CONSTRUCTION COMPANY, LTD.,
Appellant,
vs.
C. W. LERCHE, Appellee.

Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK

No. 14842

United States
Court of Appeals
for the Ninth Circuit

FISHER CONSTRUCTION COMPANY, LTD.,
Appellant,
vs.
C. W. LERCHE, Appellee.

Transcript of Record

Appeal from the District Court of Guam,
Territory of Guam

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	7
Appeal:	
Certificate of Clerk to Transcript of Record	
on	21
Designation of Record on (DC).....	20
Notice of	16
Orders for Extension of Time on.....	17, 18
Statement of Points on (DC).....	19
Statement of Points and Designation of Rec-	
ord on (USCA)	166
Stipulation and Order Extending Time on..	18
Stipulation that Execution and Proceedings	
be Stayed Pending	17
Certificate of Clerk to Transcript of Record..	21
Complaint—Breach of Contract	3
Exhibit A—Letter Agreement of Sept. 29,	
1952	6
Designation of Record on Appeal (DC).....	20
Designation of Record, Statement of Points	
and (USCA)	166
Findings of Fact and Conclusions of Law.....	13

Judgment	15
Names and Addresses of Attorneys....	1
Notice of Appeal	16
Orders for Extension of Time.....	17, 18
Pretrial Order	9
Statement of Points on Appeal (DC).....	19
Statement of Points and Designation of Record (USCA)	166
Stipulation and Order Extending Time.....	18
Stipulation that Execution and Proceedings be Stayed	17
Transcript of Proceedings and Testimony.....	23
Exhibit A for Defendant—Letter dated Mar. 16, 1954, Thomas Henry Curran to A. M. Fisher	134
Witnesses:	
Bitting, Paul	
—direct	123
—cross	125
Bogovich, Paul	
—direct	116
—cross	118
—redirect	120
Dieckman, Harold	
—rebuttal, direct	150
—cross	152
—By the Court	152

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Fisher, A. M.

—direct	128
—cross	138, 149

Lerche, C. W.

—direct	26
—cross	44
—redirect	60
—recross	62
—By the Court	63
—rebuttal, direct	155
—cross	158
—By the Court	159

Morrison, James M.

—direct (Plaintiff)	85
—cross	90
—redirect	91
—direct (Defendant)	99
—cross	107
—By the Court	113
—recross	114
—rebuttal, direct (Plaintiff).	162

Poole, Frederick M.

—rebuttal, direct	152
—cross	154
—By the Court	155

Warashima, Howard H.

—direct	67
—By the Court	84

NAMES AND ADDRESSES OF ATTORNEYS

SPIEGEL, TURNER & STEVENS,

613 Wilshire Boulevard,
Santa Monica, California,

Attorneys for Appellant.

E. R. CRAIN,

Aflague Building,
P.O. Box 406,
Agana, Guam,

Attorney for Appellee.

District Court of Guam, Territory of Guam,
Marianas Islands

Civil Case No. 63-54

C. W. LERCHE,

Plaintiff,

vs.

FISHER CONSTRUCTION COMPANY, LTD.,
Defendant.

BREACH OF CONTRACT

Plaintiff complains of the defendant and for a first cause of action alleges:

1. That plaintiff is a resident of the territory of Guam, that defendant is a corporation organized and existing under the laws of the territory of Hawaii, and that the subject matter of this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

2. That on the 29th day of September, 1952, plaintiff and defendant made a contract of employment, the terms of which are set out in Exhibit "A" attached hereto and made a part hereof.

3. That plaintiff entered upon his employment under said contract, and duly performed all the conditions thereof on his part until the defendant refused, as hereinafter mentioned, to permit him to continue further in his employment thereunder; that plaintiff has always been, and is now, ready and willing to perform all the terms, requirements, and

conditions of said contract on his part, and has heretofore offered to perform the same.

4. That defendant, through its president, A. M. Fisher, on the 24th day of May, 1954, refused, and has ever since refused, to allow plaintiff to perform the duties and conditions on his part of said contract of employment, and refuses to pay him thereunder or therefor, to plaintiff's damage in the sum of Three Thousand Six Hundred and Fifty-Seven Dollars (\$3,657.00), and in the additional sum of Ten Thousand Dollars (\$10,000.00) as general damages.

For a second cause of action, plaintiff alleges:

1. Re-alleges paragraphs 1, 2, 3 and 4 of his First Cause of Action herein as though set forth in full.

2. That defendant corporation, in its Guam operation, from September 29, 1952, to May 24, 1954, made a net profit before Guam and United States income taxes in the sum of Eighty One Thousand Seven Hundred and Thirty Dollars (\$81,730.00).

3. That defendant has refused to pay plaintiff a sum equal to ten per cent (10%) of the net profit of the Guam operation of said defendant to plaintiff's damage in the sum of Eight Thousand One Hundred Seventy-Three Dollars (\$8,173.00).

For a third cause of action, plaintiff alleges:

1. Re-alleges paragraph 1 of plaintiff's First Cause of Action as though herein set out in full.

2. That plaintiff was employed by defendant within the territory of Guam from the 29th day of September, 1952, to the 24th day of May, 1954, and during that time for a period of seventy-one (71) weeks used his own private motor vehicle in the service of defendant.

3. That defendant is indebted to the plaintiff in the sum of Seven Hundred and Ten Dollars (\$710.00) for the maintenance and use by plaintiff of his own motor vehicle in the service of defendant for a period of seventy-one (71) weeks, and that defendant is further indebted to plaintiff in the sum of Two Thousand Three Hundred and Four Dollars (\$2,304.00) for the return transportation of plaintiff and his family from Guam to the west coast of the United States.

4. That no part of said sum of Three Thousand and Fourteen Dollars (\$3,014.00) has been paid although the plaintiff has demanded the same from the said defendant.

Wherefore, plaintiff prays judgment against the defendant for the sum of Twenty Four Thousand Eight Hundred Forty-four Dollars (\$24,844.00), and for costs of suit.

/s/ E. R. CRAIN,
Attorney for Plaintiff.

EXHIBIT "A"

[Letterhead of Fisher Construction Company, Ltd.]

Mr. C. W. Lerche

September 29, 1952

P.O. Box 150, Agana, Guam

Dear Mr. Lerche:

The following will serve to confirm our verbal agreement relative to your employment with us.

You are to be employed by us in the capacity of Administrator at a salary of One Hundred Seventy Five (\$175.00) Dollars per week, less whatever advances have been made or will be made to you. In addition to this amount you will receive a bonus at the end of the year amounting to ten per cent of the net profits of the Guam operation before Federal and Guamanian income taxes have been deducted.

It is understood that this agreement shall be for a period of two years. Should we cease operation before the end of that period we agree to provide transportation to the West Coast of the United States for yourself, Mrs. Lerche and your two children.

The entire agreement is based on you giving the business your undivided attention and maintaining a high personal standing in the community.

Very truly yours,

Fisher Construction Company, Ltd.

/s/ A. M. Fisher, President

Accepted by /s/ C. W. Lerche, 29 Sept. 1952.

[Endorsed] Filed Sept. 30, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now defendant in answering the complaint of the plaintiff on file herein admits, denies and alleges as follows:

First Cause of Action

1. Answering the allegations contained in Paragraph 1 of said cause of action, admits the allegations therein contained.

2. Answering the allegations contained in Paragraph 2 of said cause of action, admits the allegations therein contained.

3. Answering the allegations contained in Paragraph 3 of said cause of action, denies each and every allegation therein contained.

4. Answering the allegations contained in Paragraph 4 of said cause of action, admits that defendant discharged plaintiff, but except as hereinbefore admitted denies each and every allegation therein contained.

Second Cause of Action

5. Answering the allegations contained in Paragraph 1 of said cause of action, admits the allegations contained in Paragraphs 1 and 2 of the first cause of action, but except as hereinbefore admitted, denies each and every allegation contained in said paragraph.

6. Answering the allegations contained in Paragraph 2 of said cause of action, denies each and every allegation contained in said paragraph.

7. Answering the allegations contained in Paragraph 3 of the said cause of action, admits that defendant has refused to pay plaintiff any portion of its net profits, but except as hereinbefore admitted, denies each and every allegation contained in said paragraph.

Third Cause of Action

8. Answering the allegations contained in paragraph 1 of said cause of action, denies each and every allegation contained in said paragraph.

9. Answering the allegations contained in Paragraph 2 of said cause of action, denies each and every allegation contained in said paragraph.

10. Answering the allegations contained in Paragraph 3 of said cause of action, denies each and every allegation contained in said paragraph.

11. Answering the allegations contained in Paragraph 4 of said cause of action, denies each and every allegation contained in said paragraph.

12. Except as hereinbefore expressly admitted, defendant denies each and every allegation contained in said complaint.

Wherefore, defendant prays plaintiff take nothing by his complaint and it be dismissed hence with its costs.

TURNER & STEVENS,
Attorneys for Defendant

/s/ By LYLE H. TURNER

[Endorsed]: Filed Nov. 19, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

E. R. Crain, Attorney for the Plaintiff; Turner and Stevens, Attorneys for Defendant.

Time: January 11, A.D., 1955 at 9:30 a.m.

I. Pleadings:

Under date of September 30, 1954 the plaintiff filed his complaint, stating three causes of action. For the first cause of action he alleges that he entered into a contract of employment under date of September 28, 1952 under the terms of which he was to be employed by the defendant for a period of two years at a salary of \$175 a week, and that he was discharged on May 24, 1954, to his damage in the amount of \$3,657.00 and \$10,000.00 general damages. For a second cause of action he alleges that under the terms of his employment agreement he was to receive a bonus of ten percent of the net profits in the amount of \$8,173.00. For a third cause of action he alleges that he was required to use his personal automobile in the service of the defendant for 71 weeks in the amount of \$710.00, and that under the agreement he is entitled to return transportation for himself and family to the United States at a cost of \$2,304.00. The plaintiff seeks total damages in the amount of \$24,844.00.

The defendant filed an answer in which it admits that a contract was entered into and that the defendant was discharged. In answer to the second

cause of action it admits that it has refused to pay plaintiff any portion of its net profits but denies otherwise. In answer to the third cause of action it denies each paragraph thereof.

II. Conference:

At the pretrial conference the plaintiff contended that he performed satisfactorily under the terms of the agreement and that his salary had been increased from \$175 to \$200 per week; that he has not been paid the bonus due him or the other amounts claimed; that he attempted to keep down damages by engaging in other activities but the amounts earned by him were not made clear at the conference.

The defendant contended that the plaintiff was discharged for the reason that he failed to perform his duties satisfactorily; that he failed to devote his undivided attention to the business of the defendant and that he failed to maintain the high personal standing in the community required by the agreement.

III. Witnesses for the Plaintiff:

1. The plaintiff will testify to the entering into of the employment agreement and to the satisfactory performance of his duties thereunder.

2. Mr. Dieckman, a construction man, will testify that the plaintiff performed his duties satisfactorily.

3. Paul Parker will testify that the plaintiff performed his duties satisfactorily.

4. Jack Cook, a construction man, will testify that the plaintiff performed his duties satisfactorily.

5. Fred Poole, an employee of the Government of Guam, will testify that the plaintiff performed his duties satisfactorily.

6. Captain Airol, contracting officer for the United States Air Force, will testify to the satisfactory performance of plaintiff's duties.

7. Roy Cox will testify as to the satisfactory performance of plaintiff's duties.

IV. Witnesses for the Defendant:

1. Mr. Fisher will testify that the agreement was entered into and that the service of plaintiff became unsatisfactory and more particularly that he failed to estimate jobs properly, leading to losses or lack of profits; that he failed to account for material delivered for use on the job sites; that he failed to maintain an adequate material inventory, leading to increased cost of local purchases or delay in construction; that he failed to devote his undivided attention to the interest of his employer.

2. Mr. J. M. Morrison, an employee of defendant, will testify to the unsatisfactory service of the plaintiff.

3. Paul Bitting will testify to the unsatisfactory service of the plaintiff and his failure to devote his undivided attention to his work.

4. Richard Yamaguchi will testify to the unsatisfactory service of the plaintiff.

5. Pat Wright, an electrical subcontractor, will testify to the unsatisfactory service of the plaintiff and to his unsatisfactory standing in the community.

6. Paul Bogovich will testify that plaintiff's standing in the community is bad.

7. George Selwyn will testify that plaintiff did not pay his just debts and his standing in the community is bad.

8. James H. Van Sickland will testify that plaintiff did not pay his debts and his standing in the community is bad.

9. Mrs. Carlino Rosario will testify that plaintiff did not pay his just debts and that his standing in the community is bad.

V. Admissions:

1. The defendant admits that the agreement was entered into and that plaintiff is entitled to a bonus for the period of his employment based upon profits, if any.

2. The defendant admits that plaintiff's salary was increased to \$200 per week at a date prior to his discharge.

VI. Stipulation:

The parties stipulated that either party may call additional witnesses by giving the opposing party ten days' notice prior to trial with a statement of what the witness will testify to and by filing a copy of such notice in court.

VII. Issues for Trial:

1. Whether the defendant breached its contract with the plaintiff without cause and if so, the measure of damages.

2. Whether the plaintiff's conduct and lack of

performance was such that the defendant was warranted in discharging him.

VIII. Order:

It is herewith ordered:

The above entitled action is set for trial March 7, 1955 at 9:30 a.m.

Dated and entered this 11th day of January, A.D., 1955.

/s/ PAUL D. SHRIVER,
Judge

Approved:

/s/ LYLE H. TURNER,
Attorney for Plaintiff

[Endorsed]: Filed Jan. 11, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial, and the Court having dismissed counts 2 and 3 of the complaint herein at the conclusion of Plaintiff's case, and having heard and considered all of the evidence upon count 1 of said complaint, and being fully advised in the premises, the Court now finds the following:

Findings of Fact

1. Plaintiff and Defendant entered into a contract, on the 29th day of September, 1952, whereby plaintiff was employed by defendant for a period of two (2) years from the date of said contract, at a salary of One Hundred Seventy five Dollars (\$175.00) per week.

2. Commencing February 1, 1954, defendant increased the compensation of plaintiff under said contract to Two Hundred Dollars (\$200.00) per week.

3. While defendant was in some degree dissatisfied with plaintiff's performance under said contract, said performance was accepted by defendant, and defendant breached said contract by discharging the plaintiff without notice and without cause under the terms of said contract on the 24th day of May, 1954.

4. That plaintiff would have earned the total sum of Three Thousand Six Hundred Dollars (\$3,600.00) had he been permitted to complete his contract with defendant and that from the date of his discharge to the 29th day of September, 1954, plaintiff earned a total sum of Four Hundred Dollars (\$400.00).

Conclusions of Law

From the foregoing facts the Court concludes:

1. That Plaintiff is entitled to judgment against the Defendant in the sum of Three Thousand Two Hundred Dollars (\$3,200.00).

2. That Plaintiff is entitled to his costs and disbursements incurred or expended herein.

Let judgment be entered accordingly.

Dated this 21st day of April, 1955.

/s/ PAUL D. SHRIVER,
Judge

[Endorsed]: Filed April 21, 1955.

District Court of Guam, Territory of Guam

Civil Case No. 63-54

C. W. LERCHE,

Plaintiff,

vs.

FISHER CONSTRUCTION COMPANY, LTD.,
Defendant.

JUDGMENT

The above entitled action came on for trial before the Court without a jury, on the 11th day of April, 1955, at the Courthouse in the Guam Congress Building, in the City of Agana, territory of Guam, the Plaintiff appearing in person and by his attorney, E. R. Crain; and the Defendant appearing by its president, A. M. Fisher, and its vice-president, James Morreson, and by its attorney, Lyle H. Turner, and testimony having been offered by the parties, and the Court having filed its findings of fact, conclusions of law, and order for judgment, it is hereby

Ordered, adjudged and decreed, that the Plaintiff, C. W. Lerche, have judgment against the Defendant in the sum of Three Thousand Two Hundred Dollars (\$3,200.00), and for his costs and disbursements in this action, to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of Thirty-seven Dollars (\$37.00).

Dated this 21st day of April, 1955.

/s/ PAUL D. SCHRIVER,
Judge

Entered in civil docket April 21, 1955.

Costs taxed this 29th day of April, 1955.

ROLAND A. GILLETTE, Clerk

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Fisher Construction Company, Ltd., defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 21st day of April, 1955.

Dated: April 28, 1955.

SPIEGEL, TURNER & STEVENS,
Attorneys for Appellant

/s/ RUSSELL L. STEVENS

[Endorsed]: Filed May 2, 1955.

[Title of District Court and Cause.]

STIPULATION THAT EXECUTION AND
PROCEEDINGS BE STAYED

Bond in the sum of \$4,500.00 having been filed herein by defendant, counsel for plaintiff and defendant hereby stipulate, subject to approval of the Judge of the District Court of Guam, that execution and other proceedings herein be stayed pending appeal herein, and that the writ of execution heretofore issued herein be, and the same hereby is, set aside and vacated.

Dated: Agana, Guam, May 16th, 1955.

TURNER & STEVENS,
/s/ By RUSSELL L. STEVENS,
Attorneys for Defendant

/s/ E. R. CRAIN,
Attorney for Plaintiff

Approved: Date:

/s/ PAUL D. SCHRIVER,
Judge, District Court of Guam

[Endorsed]: Filed May 17, 1955.

[Title of District Court and Cause.]

ORDER FOR EXTENSION OF TIME

Upon motion of counsel for defendant, and the court being fully advised in the premises, it is hereby ordered, adjudged and decreed that the de-

fendant may and it does have until and including June 20, 1955 in which to file herein its designation of points on appeal and the record to be transcribed.

Dated: Agana, Guam, the 10th day of June, 1955.

/s/ PAUL D. SCHRIVER,

Judge, District Court of Guam

[Endorsed]: Filed June 10, 1955.

[Title of District Court and Cause.]

ORDER FOR EXTENSION OF TIME

Upon motion of counsel for defendant, and the Court being fully advised in the premises, the time of defendant within which to file herein its designation of points on appeal and the record to be transcribed is hereby extended to and including July 6, 1955.

Dated: Agana, Guam, the 20th day of June, 1955.

/s/ PAUL D. SCHRIVER,

Judge, District Court of Guam

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME

It is hereby stipulated by and between counsel for Plaintiff and Defendant that defendant shall have to and including the fourteenth day of July,

1955 within which to file herein its designation of points on appeal and record to be transcribed, and the time for filing the record on appeal and docketing the appeal of the above entitled cause in the United States Court of Appeals for the 9th Circuit be, and it is hereby extended to and including the 22nd day of July, 1955.

Dated: Agana, Guam, the 6th day of July, 1955.

TURNER & STEVENS,

/s/ By LYLE H. TURNER,
Attorney for Defendant

/s/ E. R. CRAIN,
Attorney for Plaintiff

Approved: July 6, 1955.

/s/ Judge JOSE C. MANIBUSAN,
For Judge Paul D. Schriver

[Endorsed]: Filed July 6, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Defendant-appellant herewith presents the points upon which it claims the court erred:

1. The court erred in excluding evidence of plaintiff's unsatisfactory performance of his duties before February 1, 1954.

2. The court erred in holding that defendant had breached the employment contract.

3. The court erred in the measure of damages applied.

4. The judgment and the conclusions of law are contrary to the findings of fact herein entered.

5. The judgment and findings of fact are contrary and opposed to the weight of the evidence.

Dated: This 2nd day of July, 1955.

SPIEGEL, TURNER & STEVENS

/s/ By GERALD G. WOLFSON,

Attorneys for Defendant-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD
ON APPEAL

Defendant-appellant, by its attorneys, hereby designates, pursuant to Rule 75 of the Federal Rules of Civil Procedure, the following, to constitute the transcript of record on appeal in the above entitled case:

1. Complaint.
2. Answer.
3. Pretrial Order dated January 11, 1955.
4. All exhibits and documentary evidence admitted into evidence.
5. Findings of Fact and Conclusions of Law.
6. Judgment.

7. Notice of Appeal.
8. Stipulation that Execution and Proceedings be Stayed.
9. Order for Extension of Time dated June 10, 1955.
10. Order for Extension of Time dated June 20, 1955.
11. Transcript of Proceedings at the Trial.
12. Defendant's Notice of Appeal.
13. Statement of Points on Appeal.
14. Designation of Record on Appeal.

Dated: This 2nd day of July, 1955.

SPIEGEL, TURNER & STEVENS

/s/ By GERALD G. WOLFSON,

Attorneys for Defendant-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1955.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M.I., do hereby certify that the following documents, to wit:

1. Complaint, filed September 30, 1954.
2. Answer, filed November 19, 1954.
3. Pre Trial Order, filed January 11, 1955.

4. Findings of Fact and Conclusions of Law, filed April 21, 1955.

5. Judgment, entered and filed April 21, 1955.

6. Notice of Appeal, filed May 2, 1955.

7. Stipulation That Execution and Proceedings be Stayed, filed May 17, 1955.

8. Order for Extension of Time, filed June 10, 1955.

9. Order for Extension of Time, filed June 20, 1955.

10. Stipulation Extending Time, filed July 6, 1955.

11. Statement of Points, filed July 11, 1955.

12. Designation of Record on Appeal, filed July 11, 1955.

13. Court Reporter's Transcript of Proceedings, are the original documents filed in the office of the Clerk of this court in the above entitled case.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M.I., this 12th day of July, A.D., 1955.

[Seal] /s/ ROLAND A. GILLETTE,
 Clerk

[Endorsed]: Filed July 14, 1955.

District Court of Guam, Territory of Guam

Civil Case No. 63-54

C. W. LERCHE,

Plaintiff,

vs.

FISHER CONSTRUCTION COMPANY, LTD.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

April 11, 1955, Agana, Guam

Before: The Honorable Paul D. Shriver, Judge.

Appearances: For the Plaintiff: E. R. Crain, Attorney at Law, Agana, Guam. For the Defendant: Lyle H. Turner, Turner & Stevens, Attorneys at Law, Agana, Guam. [1*]

Monday, April 11, 1955, 9:30 a.m.

The Court: First order of business?

The Clerk: Civil Matter 63-54, C. W. Lerche vs. Fisher Construction Company, Ltd. coming on for trial.

The Court: Plaintiff ready?

Mr. Crain: Yes, sir.

The Court: Defense ready?

Mr. Turner: Yes, sir.

The Court: What about the pretrial order?

Mr. Crain: If the court please, the pretrial order does not show that the books and tax returns would

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

be made available to the plaintiff and I feel that they should in view of the fact that they were not furnished until last Thursday night.

The Court: This pretrial order was entered on the 11th of January.

Mr. Crain: That is correct.

The Court: Why is the objection delayed until April 11?

Mr. Crain: I brought it up a number of times—one time at the time the other trial date was set it was brought up. At the time Mr. Stevens said the books would be made available.

The Court: I mean the absence of the stipulation in the pretrial order should have been called to the court's attention before this time.

Mr. Crain: I have called it to the court's attention on several occasions.

The Court: Well, I realize that and, of course, the court [2] continued the case. It was originally set for March.

Mr. Crain: That continuance was at Mr. Stevens request, not mine.

The Court: That was made at your request?

Mr. Crain: No, sir. I made the original request but I withdrew my request and it was continued at Mr. Stevens'.

Mr. Turner: If it please your Honor, the books are in Honolulu.

Mr. Crain: That is begging the question.

Mr. Turner: No, it is not begging the question. We will leave it up to the court. It is my understanding last Monday there was supposed to be a

man up from the company and he never came. The first time I had a application to look at the books was the end of last week.

Mr. Crain: You haven't been here.

Mr. Turner: I have discussed it with Mr. Stevens. We can't expect to keep books here and not have them in Honolulu.

The Court: The court's recollection is that at the time this case was originally continued until today that Mr. Crain informed the court that the accountant whom he wishes to employ to examine into the books was so busy with income tax work that he would not be available to make the required examination and to go to trial at the time it was set.

Mr. Crain: That was my original contention when I came in and at that time the court said to me exactly what the court [3] said last week: "Go ahead and try the case and we will worry about these accounting problems later," and I said all right. It was Mr. Stevens who came in after that and asked for the continuance and I said, "No objection," but I did not get the last continuance in this case or the only continuance and we couldn't audit books that were not here.

Mr. Turner: I would like to state for the record, though, your Honor, those books were sent to Honolulu for the normal and ordinary audit of the company because the head office was there and it has been a period of four months.

Mr. Crain: If the court please, the books went back to Honolulu in November and the subject of

availability first came up at the pretrial conference, January 11, and I said we would go to Honolulu to find out what was missing.

Mr. Turner: The big point is no effort was made on the part of the plaintiff to get an audit.

Mr. Crain: The court knows that isn't true.

The Court: As I understand it, the books are here now?

Mr. Crain: They arrived last Wednesday night at midnight—what they say are the books.

The Court: Well, call your first witness.

Mr. Crain: Mr. Lerche.

MR. C. W. LERCHE

plaintiff, called as a witness in his own behalf, was duly sworn and testified as follows: [4]

Direct Examination

Q. (By Mr. Crain): Please state your full name. A. Carl William Lerche.

Q. You will have to speak a little more loudly. We have no PA system.

A. Carl William Lerche.

Q. Where do you live, Mr. Lerche?

A. In Maite.

Q. How long have you been in Guam?

A. Since February of 1950.

Q. For whom did you come to Guam?

A. For the Vinnell Construction Company.

Q. What was your position with Vinnell Construction Company? A. Project engineer.

Q. How long did you remain in the employ of Vinnell?

(Testimony of C. W. Lerche.)

A. About two years. I completed two full employment contracts.

Q. Did you hold the same position with them during all that time? A. Yes, sir, I did.

Q. In relation to the project manager on those jobs where did your job fall?

A. Immediately below the project manager.

Q. How many project managers did Vinnell have during that [5] period of time? A. Five.

Q. After you had completed your second contract with Vinnell for whom did you work?

A. The Government of Guam.

Q. What was the nature of your job there?

A. Head of Engineering and Planning.

Q. How long were you with the Government of Guam? A. Six months exactly.

Q. Why did you leave the employ of the Government of Guam?

A. Because it was impossible for me to function in such a manner that the work I was intended to perform could be carried out.

Q. Were you on a probationary period with your employment with the Government of Guam?

A. Yes.

Q. How long did that continue?

A. Six months probationary.

Q. Did you or the Government of Guam request release from the contract?

A. I requested release approximately 90 days before.

(Testimony of C. W. Lerche.)

Q. Was that granted? A. Yes.

Q. What is your educational background?

A. I went to engineering school in Denmark. I came to [6] the United States in 1921 and I have been in the construction business ever since.

Q. When were you employed by Fisher Construction Company, Ltd.?

A. About the 17th of September 1952.

Q. Did you enter into a contract with Fisher?

A. Yes.

Q. Do you recall the date of that contract?

A. I think it was the 28th or 29th of September.

Q. Of 1952? A. Yes.

Q. By the terms of that contract how long were you to work for Fisher Construction Company?

A. Two years.

Q. Where? A. On Guam.

Q. What was the salary stated?

A. \$175 a week plus 10 percent of the profits before taxes of the Guam operations.

The Court: The contract, of course, speaks for itself. Shouldn't that be introduced? I think it's admitted.

Mr. Crain: It's admitted.

Mr. Turner: Do you have the original?

Mr. Crain: No, it's in Fisher's file.

Q. (By Mr. Crain): Is the contract as set out in Exhibit A [7] attached to the complaint the contract that you signed with Mr. Fisher?

A. I believe so.

(Testimony of C. W. Lerche.)

Q. You have read it and it compares to be the same? A. Yea.

The Court: The defendant doesn't question it?

Mr. Turner: No, we will stipulate Exhibit A to be the contract.

Q. (By Mr. Crain): What was the date of the termination of your employment with Fisher Construction Company?

A. 24th of May 1954.

Mr. Crain: Incidentally, if the court please, I would like to have the witnesses who will testify later for the defendant excluded from the courtroom. There are several here I know.

The Court: Any objection, Mr. Turner?

Mr. Turner: The only trouble—I do want to keep the officers of the defendant.

Mr. Crain: I have no objection to Mr. Morrison or Mr. Fisher, but I mean the other witnesses here.

The Court: In the case of C. W. Lerche vs. Fisher Construction Company, Ltd. all witnesses who expect to testify or who have been subpoenaed to testify in this case will remain out of the courtroom until after their testimony has been given, except Mr. Morrison and Mr. Fisher and, of course, Mr. Lerche.

Mr. Crain: What was my last question? [8]

(The reporter read the last question and answer.)

Q. (By Mr. Crain): At the time you were terminated had you completed your contract with Fisher Construction Company? A. No, sir.

(Testimony of C. W. Lerche.)

Q. What was the job that you were hired for?

A. Contract administrator.

Q. Is that—excuse me, I didn't hear that.

A. Contract administrator.

Q. Is that the job that you performed during the months you were on the Fisher payroll?

A. That and additional work.

Q. What was the nature of the additional work?

A. A certain amount of field supervision.

Q. Subsequent to your employment did the company send another man out here to be the contract administrator?

A. Would you repeat that question?

Q. I said subsequent to the time you were employed did the company later send another man to Guam to be the contract administrator?

A. Yes, sir.

Q. Who was that man? A. Mr. Morrison.

Q. Do you recall when Mr. Morrison arrived in Guam?

A. I believe it was the latter part of February or the first part of March, '53. [9]

Mr. Turner: I am sorry. We can't hear. Can you speak a little louder?

Mr. Crain: Well, I can't help the construction of the building.

Mr. Turner: He can speak a little louder.

Q. (By Mr. Crain): After Mr. Morrison arrived in Guam what was the nature of your duties with the company?

A. I was made assistant to Mr. Morrison.

(Testimony of C. W. Lerche.)

Q. Did your work then primarily consist of supervising construction in the field?

A. Yes, sir.

Q. Did you perform the jobs that were required of you by the company and by the people who were your superiors during the time you were working for Fisher Construction Company?

A. Yes.

Q. Did you give the company your full time and your best efforts during the period you were employed?

A. Yes, sir.

Q. Who informed you that your services with the company were being terminated?

A. Mr. Fisher.

Q. Do you recall the approximate date that Mr. Fisher so informed you of that?

A. 24th of May 1954.

Q. At the time that Mr. Fisher informed you your contract [10] was being terminated were you ready, willing and able to continue in the performance of your contract?

A. Yes, sir.

Q. Did you so inform Mr. Fisher?

A. Yes, sir.

Q. Were you ever given a raise in pay during the time you were working for Fisher Construction Company?

A. About the first part of February 1954 my pay was increased \$25 a week.

Q. Making your pay from that point on \$200 a week, is that correct?

A. Yes.

Q. At that time were you given any explanation as to why you were given the raise?

(Testimony of C. W. Lerche.)

A. Mr. Fisher stated that he found that my services had been satisfactory up until that point and that he wanted me to take on additional work.

Q. If you had remained in the employment of the Fisher Construction Company from May 24, 1954 to September 29, 1954 approximately what would your earnings have been during that period of time? A. In excess of \$3,600.

Q. What did you do from May 24, 1954 to September 29, 1954?

The Court: Would you explore, Mr. Crain, the question—he was terminated on May 24. Now is that the date of his final [11] salary payment or was he given——

Mr. Crain: I will ask that question.

Q. (By Mr. Crain): What was the last day through which you were paid by Fisher Construction Company?

A. I believe it to be May 24 but I can't say that now because I can't remember at what particular day their pay period closed.

Q. Your best recollection is that May 24 was the last? A. Right.

The Court: Do I understand, Mr. Lerche, that you were terminated as of May 24 and you worked up to May 24?

A. I worked the morning of May 24.

The Court: And you were given no severance pay? A. No.

Q. (By Mr. Crain): Did you answer my last

(Testimony of C. W. Lerche.)

question as to what you did from May 24, 1954 to September 29, 1954?

A. I tried to find other employment.

Q. Did you actually find other employment?

A. Yes.

Q. When did you go to work at other employment? A. On the 7th of June.

Q. Of June 1954? A. Yea.

Q. For whom did you go to work?

A. Modern Builders. [12]

Q. Is that the company operated by a Mr. Roy Cox? A. Yes, sir.

Q. Did that company have any jobs contracted for at the time you went with it?

A. They had two jobs that were old sour ones that had to be done over.

Q. They had no new work at that time, is that correct? A. No.

Q. What was to be the nature of your remuneration with Modern Builders?

A. 50 percent of the net.

Q. From the period of June 7, 1954 to September 29, 1954 was there any net profit?

A. No, sir.

Q. Did you draw any money against anticipated profits at that time?

A. I drew about \$400.

Q. During the time that you were employed by Fisher Construction Company were you furnished company transportation for the purpose of supervising the jobs under you?

(Testimony of C. W. Lerche.)

A. Part of the time.

Q. Were there times when you were not furnished such transportation? A. Yes, sir.

Q. Will you tell the court approximately what length of [13] time you were required to furnish your own transportation?

A. About 71 weeks.

Mr. Turner: What was that?

Mr. Crain: 71 weeks.

Q. (By Mr. Crain): Did you have any kind of arrangement with the company, formal or informal, as to reimbursement for the use of your own vehicle? A. No.

Q. What would you consider a reasonable amount?

A. Let me modify that answer because I did have this arrangement when I went to work for them that I was to be furnished transportation during business hours.

Q. From the time you went to work for them how long were you furnished that transportation?

A. All told for a period not to exceed 4 months.

Q. Was that all at the beginning of your employment period or——

A. No, at the time I went to Umatic school job I was furnished the pick-up to provide transportation.

Q. At the time you went to work for Fisher you were furnished an automobile, is that correct?

A. Yes, sir.

(Testimony of C. W. Lerche.)

Q. It is my understanding that that automobile was wrecked? A. That is right.

Q. And what were the circumstances? [14]

A. A friend of mine came up to the house one night and asked to borrow it and when he didn't come back I found it had been wrecked at Barri-gada.

Q. Who paid for the repairs? A. I did.

Q. And it was restored to service?

A. Yes.

Q. And it was subsequently used for the company? A. Yes.

Q. But not by you? A. Yes.

Q. Who used it?

A. Vern Jules, Honolulu.

Q. What kind of a car was it?

A. A Buick sedan.

Q. And after that you used your own vehicle?

A. Yes.

Q. What would you consider the reimbursement per work week for the use of your vehicle on the job to be? A. About \$10.

Q. Per week? A. Um huh.

Q. According to the terms of your agreement with Fisher Construction Company upon the completion of your contract you were to be provided transportation to the west coast of the [15] United States for yourself, Mrs. Lerche and your two children. Was any such transportation ever furnished or offered? A. No, sir.

Q. At the time you went to work for Fisher

(Testimony of C. W. Lerche.)

Construction Company on September 29, 1952 until May 24, 1954 what jobs did that company have on Guam? A. Adelupe School was one.

Q. Were there others?

A. Yes, there were about four Air Force jobs—three Air Force jobs.

Q. That were going at that time?

A. They were just getting started at that time. There was the mezzanine of the nose hangars at Anderson Air Force; there was a water line at Agafo Gumas, a water line at Marbo, the extension to the water line at Marbo and then subsequently there was the water line in the old Engineers section of the Marbo district.

Q. Those were the jobs that were running at the time you went to work? A. Yes.

Q. Who was the local field supervisor for Fisher at that time? A. Mr. Haley.

Q. Is Mr. Haley still with the Fisher Construction Company? A. No, sir. [16]

Q. Was he at the time your services were terminated? A. No.

Q. During the period of your employment with Fisher Construction Company did you have access to the books and records of the company as they pertained to the cost of local operations, job costs, materials costs and so forth?

A. The information that I had was largely on sheets that I kept myself for the benefit of keeping posted on the job. The books were mostly kept in Honolulu. From time to time there was an account-

(Testimony of C. W. Lerche.)

ant out here who did part of the work and Mr. Warashina in Honolulu did the actual accounting and closing of the books.

Q. Could you from your observation of the work that was done on the various projects during the course of your employment come to any conclusion as to whether those jobs individually were performed at a profit or a loss?

A. From my own personal knowledge I know that the company lost money on Adelupe School. On other projects such as Air Forces, Ada's Store, Atkins-Kroll, the Coast Guard job, I believe they made a profit, and that doesn't take in the hospital operation which was a joint venture with other contractors, where I did not have any access to the books.

Q. You mentioned the Coast Guard jobs. Did those Coast Guard jobs originate in Guam?

A. All the mobilization of the work was done in Guam. [17]

Q. Was there certain construction done by you and your forces here in Guam to assist in the handling of those jobs? A. Yes, sir.

Q. What did that consist of?

A. All the barrack buildings, the messhalls and the toilet facilities were prefabricated here on the island and shipped to the various islands.

Q. Do you know whether those materials were charged to the Guam operation or any other operation of Fisher?

(Testimony of C. W. Lerche.)

A. I think they were charged to the Coast Guard. I mean to the Coast Guard job as such.

Q. Have you ever had access to the cost figures on the nurses' home construction or housing at Guam Memorial Hospital or the TB wing of the hospital?

A. No.

Q. I would ask you to give us a list of the jobs that were performed by Fisher Construction Company during the period that you were employed by them. Give us the gross contract figure if you can and give us the best estimate of the profit which might have accrued to that job before taxes.

The Court: Isn't that a generalization?

Mr. Crain: It would have to be a generalization. He hadn't access to the books.

The Court: Of course you are talking about a contract here payable on the basis of net profits.

Mr. Crain: I think we are entitled to set up what we believe the net profits to have been under the circumstances. If the defendant has the books, he can adjust those figures.

The Court: You have to establish a foundation, Mr. Crain, as to what that belief is based upon.

Mr. Turner: It can't be conjecture.

Mr. Crain: I think I have established that it is based on his observation. I previously asked Mr. Lerche if he had any other basis he could use.

The Court: Well, we assume that Mr. Lerche is familiar with the construction business. The types of projects that you were talking about many of them are quite elaborate.

(Testimony of C. W. Lerche.)

Mr. Crain: That is very true.

The Court: And you can't reduce the question of profit to a set formula. There are dozens and dozens of factors which would increase or decrease profit and surely when you talk about a percentage of net profit we have to have something more than conjecture.

Mr. Crain: Well, is it the court's idea that the plaintiff is supposed to prove his profits by the adverse testimony of defendant's accountants?

The Court: Mr. Crain, you normally prove profit and loss, of course, by the books which are kept in the ordinary course of a business operation.

Mr. Crain: Yes, but we didn't operate the business, your [19] Honor.

The Court: But don't you have to rely upon those who did?

Mr. Crain: I don't see why those who kept the books might not have kept any number of sets of books.

The Court: Well now that, of course—you are asking the court to assume percentage as a matter of course.

Mr. Crain: No, I am not but we have not had access to any books.

Mr. Turner: Your Honor, I give you an example—the Campbell-Fisher joint venture books have always been on this island. There has never been any application by the plaintiff to look at them. the Koster-Whyte have always been on this island.

Mr. Crain: You are testifying in this case now.

(Testimony of C. W. Lerche.)

Mr. Turner: I am making a statement in connection with your question. The only things that went to Honolulu for the audit were the ledgers, but all of the original records have always been up there.

Mr. Crain: That is not what we have been told. If the court please, on the basis of what Mr. Turner has been saying, I wish he would put in the record the period of time he has not been on Guam—since the pretrial conference January 11—

Mr. Turner: That has nothing to do with it.

Mr. Crain: I certainly think it does.

The Court: Now, gentlemen, let's not argue about the [20] matter. The point I am raising is what is the best evidence? The best evidence, obviously, is the books that are kept in the ordinary normal course of business. Now before you can introduce secondary evidence which you are attempting to do by Mr. Lerche's estimates as to what the profit could have been, you have to establish that the primary evidence, the best evidence is not available, and to do that you have to show that the books which were kept in the ordinary course of business are not available for introduction by you and otherwise we are in the complete field of conjecture.

Mr. Crain: I withdraw my last question.

Q. (By Mr. Crain): Mr. Lerche, will you give us a list of the jobs that were performed by Fisher Construction Company in Guam or were considered to be a part of the Guam operation and give us the

(Testimony of C. W. Lerche.)

gross contract price that was bid on each one of those jobs?

A. The United States Air Force nose hangars about \$39,000——

Q. What is that?

A. United States Air Force. Agafo Gumas water line about \$44,000. The Adelupe School, \$255,000. The Harmon water line, \$92,800, and the Harmon water line extension, \$6,500 more. Santa Rita power line, \$41,000. Two jobs for Standard Vacuum about \$4,500. A typhoonizing job for United States Air Forces, \$19,800. Pedro M. Ada's store, \$20,000. Atkins-Kroll about \$29,000. The Coast Guard job about \$240,000. I am not entirely [21] familiar with it. Umatic School, \$256,000. The nurses home and quarters—in connection with them was \$1,200,000. That was a joint venture with Koster-White and the TB wing a joint venture with Campbell was about \$1,200,000.

Q. Are there other jobs?

A. There are small ones that are insignificant.

Q. Other small jobs? A. Yes.

Q. Have you ever been given a statement by Fisher Construction Company of the profit or loss on any of these jobs?

A. Yes, in February of 1953.

The Court: February 1953?

A. Yes, I received a letter from Mr. Warashina in Honolulu which set forth the statement of the Fisher Construction Company at that time.

Q. Did that statement cover the whole of Fisher

(Testimony of C. W. Lerche.)

Construction Company rather than just the Guam operation? A. I believe it did.

Q. Did you ever receive from Fisher Construction Company——

The Court: Now again you are talking about a statement which is the best evidence.

Mr. Crain: Well, I am merely laying the background for that statement. I haven't introduced it and I haven't quoted figures from it.

The Court: You are asking what a statement contained. [22]

Mr. Crain: Well, it was not a statement of the Guam operation. That was all I was interested in bringing out.

The Court: Well, do we have the statement so that the witness can examine it and make sure that it is the same statement and that it must have been sent to him for some purpose?

Mr. Crain: Well, he has it here for what it's worth. Would you like to see the statement?

Mr. Turner: Yes.

Mr. Crain: These were not attached to that statement, were they? A. No.

Mr. Crain: Do you have any objection to its introduction?

Mr. Turner: Yes, because it covers the entire operation.

Q. (By Mr. Crain): I would ask you if the letter dated September 29, 1952 and the accompanying balance sheet, financial statement and explana-

(Testimony of C. W. Lerche.)

tory schedules—were those items received by you from Mr. Warashina? A. Yes, sir.

The Court: This was '52?

Mr. Crain: September 29, 1952. I will introduce them on stipulation.

Mr. Turner: I will object, your Honor.

The Court: It would only cover October and November.

Mr. Crain: I don't want to introduce it as far as that is concerned; it makes no difference to me.

The Court: Now just a moment. The witness' testimony was that in February '53 he had received a statement.

Mr. Crain: I want to correct that testimony.

The Court: Well, I don't think you should because this is a statement that was evidently prepared in the period between October and December.

Q. (By Mr. Crain): Is it your recollection that you received it along in February '53?

A. Yes.

The Court: Then just to get the matter clear, Mr. Lerche, this is the only statement you ever received? A. That is correct.

The Court: And did you ever demand an accounting as regards the net profit? A. No.

The Court: You didn't ask for any additional statement yourself?

A. No, I normally didn't think that would come up until the completion of my contract.

The Court: Well, I agree with you that any state-

(Testimony of C. W. Lerche.)

ment as early as that would be of extremely limited value.

Mr. Crain: That is right and covering the whole job operation.

Q. (By Mr. Crain): But you were never given any statement covering the Guam operation showing profit or loss? [24] A. No, sir.

Cross Examination

Q. (By Mr. Turner): Mr. Lerche, you have testified that prior to going to work for Fisher Construction Company, Ltd. you were employed by the Government of Guam?

A. That is correct.

Q. And your employment with them was terminated at the time you went to work for Fisher?

A. Yes.

Q. And that would be about the end of September 1952?

A. I think it was actually the 17th of September.

Q. And in connection with terminating your employment then and going to work for Fisher did Mr. Fisher lend you any money at the time you terminated your Guam contract with the Government of Guam?

A. Yes, when I went to work for him, yes.

Q. After or about the same time?

A. About the same time.

Q. Do you remember how much that was?

A. \$1,200, I believe.

(Testimony of C. W. Lerche.)

Q. Did you make a subsequent loan from Fisher?

A. Yes, after a portion of the loan had been repaid I made a subsequent loan.

Q. Now this \$1,200 that you borrowed had that accumulated [25] in personal bills over a period of time?

Mr. Crain: I don't believe this is proper cross-examination, your Honor.

Mr. Turner: It is relevant.

Mr. Crain: It may be relevant but it doesn't—

The Court: He can describe the conditions of his employment.

Mr. Crain: The question of personal bills I don't see has anything to do with his employment.

Mr. Turner: It all has to do with it.

Mr. Crain: What do his personal bills prior to his employment by Fisher have to do with his employment?

The Court: Because it is one of the factors, according to the question which you entered into—one of the surrounding factors.

Mr. Crain: I don't think that is a proper question to bring out.

The Court: Then you shouldn't have gone into the question on direct examination. Your objection will be overruled. The question is whether this \$1,200 was loaned to you to pay personal bills which you had previously accumulated?

A. Yes, sir.

Q. (By Mr. Turner): And isn't it true, Mr. Lerche, that the loan was made to you by Mr.

(Testimony of C. W. Lerche.)

Fisher so that you would not have outstanding personal obligations at the time you went to work [26] for Fisher Construction Company?

A. No, not necessarily.

Q. You mean that you were becoming current in your personal bills?

A. There was nothing said as to becoming current or not current.

Q. Then how did you happen to borrow this \$1,200? A. Because I needed it.

Q. Did this bring you current?

A. No, sir.

Q. You still had outstanding bills?

A. Yes.

Q. Did the subsequent loan of \$500 bring you current? A. No.

Q. Now you testified that under the agreement you were to receive transportation for you and your family back to the West Coast upon the completion of your contract. Although the exhibit speaks for itself, I would like to have the witness read into the record this one sentence of the agreement. Would you read the last sentence, paragraph 3 in the body of the letter contract, September 29, 1952?

A. "Should we cease operation before the end of that period we agree to provide transportation to the West Coast of the United States for yourself, Mrs. Lerche and your two children." [27]

Q. Now you have testified that you were hired

(Testimony of C. W. Lerche.)

as contract administrator for Fisher Construction Company? A. Yes, sir.

Q. Isn't it true that the letter agreement referred to you as administrator?

A. I believe it refers to me as contract administrator.

Q. I would like to refresh your memory.

A. O.K.

Q. (indicating letter): Does your memory now stand refreshed that you were employed as administrator, not as contract administrator?

A. No, I was employed as contract administrator.

Q. What are the duties of a contract administrator?

A. The office functions and physical functions of administering of a contract.

Q. Would that then mean that you would be in charge of all contracts of Fisher Construction Company, Ltd.? A. That was presumed.

Q. Who would be over the contract administrator in a normal contracting set-up?

A. In the set-up we had it was supposed to be a position that was on the same level as Mr. Fisher's general superintendent at the time.

Q. Who was the general superintendent when you were employed? [28]

A. Mr. Tom Haley.

Q. So you felt that you and Mr. Haley occupied equally high positions? A. Yes.

Q. And no one was above either of you?

(Testimony of C. W. Lerche.)

A. No.

Q. Did that situation continue for very long after you were employed?

A. How long a time, actually, I don't know. I can't recall. I do know this that in order to perform the work that we had for the Air Forces in a proper manner so that we might be able to collect our money and perform within the stipulated time, it became necessary for me to take over the field supervision of the Air Force jobs because Mr. Haley was not able to do it.

Q. What time was this?

A. This was along in the fall of 1952.

Q. 1952 just after you came to work for Fisher Construction Company?

A. About six weeks after, yes.

Q. So after this happened you were administering all of the Air Force contracts both in the office and in the field? A. Yes.

Q. And all of the office administration of all of the Fisher Construction Company contracts? [29]

A. Yes.

Q. And how long did that continue?

A. Until about February of '53.

Q. And what happened in February of 1953?

A. That is the time that Mr. Fisher sent Mr. Morrison out here.

Q. And after Mr. Morrison arrived what were your duties?

A. I was told that I was Mr. Morrison's assistant.

(Testimony of C. W. Lerche.)

Q. Did you still continue to act as contract administrator?

A. No, Mr. Morrison took that over.

Q. What did you do as Mr. Morrison's assistant?

A. Mostly field supervision.

Q. Now this field supervision was supervision on the job of the various contracts that were being performed?

A. And a certain amount of buying of material.

Q. So after February 1953 you not only supervised contracts in the field but you were in charge of purchasing materials for the contracts under your supervision, is that correct?

A. I can't say that I was in charge of it, I did the majority of it.

Q. You did the majority. Can you name some of the jobs that you actually supervised in the field after February 1953?

A. Pedro M. Ada's store in Tamuning, Atkins-Kroll's new salesroom.

Q. Were you in actual field charge of Atkins-Kroll job [30] from the beginning of the job until it was completed?

A. Yes, sir.

Q. When was that job begun?

A. Somewhere around June of 1953, I would say.

Q. And when that job was completed in June of 1953—

A. It was not completed in 1953; it was commenced in 1953, June.

Q. When was it completed?

(Testimony of C. W. Lerche.)

A. I believe in September.

Q. Of 1953? A. Yea.

Q. Did you report the completion of that job to Mr. Morrison in September of 1953?

A. I presume so; I don't know.

Q. At the time you completed the job in September was it completed in accordance with the contract and specifications? A. Yes, sir.

Q. No other work remained to be done?

A. No.

Q. What other jobs did you have? Well, specifically, do you remember a house remodeled for Thomas Curran?

A. Yes, but that was not under my supervision.

Q. You had nothing to do with that job?

Mr. Crain: What was the name?

Mr. Turner: Thomas Curran. C-u-r-r-a-n. [31]

Q. (By Mr. Turner): Were you in charge of the Umatic School job?

A. I was in charge of the administrative functions. Mr. Guy was in charge in the field.

Q. You had no field functions whatsoever in connection with that job?

A. Just coordinating deliveries and setting up schedules of performance.

Q. Now you have testified that in connection with the Coast Guard job certain materials were accumulated here. Isn't it true that those were the materials for the Cocos Island job?

A. No, sir, this was for the job in the Philippines.

(Testimony of C. W. Lerche.)

Q. Were any materials accumulated here for the Cocos Island job?

A. All the material was.

Q. Who was in charge of accumulating that material?

A. Up until the time of my separation from Fisher Construction I was in charge.

Mr. Turner: Would you read that answer please?

(The reporter complied with the request.)

Q. (By Mr. Turner): Do you remember any instructions from Mr. Morrison or Mr. Fisher with reference to the time of starting of construction on Cocos Island job that all of the material was to be accumulated here on Guam? A. Yes, sir. [32]

Q. And what were those instructions?

A. Not to start the job until all the material was here.

Q. Up until three months in advance of the time of starting of the job? A. No, sir.

Q. Were all the materials there in advance?

A. No, sir. We ordered from the supplier and the stock of materials up in the warehouse at the hospital when I came to pick them up in the morning to ship them out they were not there.

Q. Which supplier was that? A. Cook.

Q. And what is his first name? A. Jack.

Q. Is he in business in Guam or was he then?

A. Yes.

Q. What type of business?

A. Plumbing.

Q. What were these materials?

(Testimony of C. W. Lerche.)

A. Oh, they were certain plumbing fittings that were needed for the job.

Q. Isn't it true that one valve had to be shipped in from Honolulu by air for that Cocos Island job?

A. Not to my knowledge.

Q. You feel that except for the material you were to get from Cook it was all accumulated? [33]

A. That is right, that was what I was told the morning it was to be shipped over that we had all the material in.

Q. You testified that you devoted your entire efforts to the company during the time you were employed by them? A. Yes, sir.

Q. May I ask you if you have ever utilized any of the company equipment for work outside of company activities? A. No, sir.

Q. Did you ever collect any money from anyone in Guam in connection with the use of company materials or equipment, which money was not transmitted into the company? A. No, sir.

Q. Do you remember Mr. Fisher issuing instructions that no material or work was to be done for Mr. Bogovich in the Surf Club?

A. No, sir.

Q. You do know you did order some windows for Mr. Bogovich for the Surf Club?

A. Yes, sir.

Q. When did you order those windows?

A. I believe it was in January 1953.

Q. From whom were those windows ordered?

A. San Diego Glass and Paint.

(Testimony of C. W. Lerche.)

Q. And to whom were they shipped? Who was the consignee?

A. Either Fisher Construction Company or Paul Bogovich. [34] I can't recall.

Q. Is that an action you took on behalf of Fisher Construction Company in taking this window order and sending it off?

A. After Mr. Fisher verbally told me we were awarded the contract for remodeling the downstairs.

Q. Who did Mr. Bogovich pay for those windows?

A. He paid the San Diego Glass and Paint.

Q. Did he ever give you any money for any materials ordered?

A. No, sir.

Q. Never gave you any money for any materials ordered for his building?

A. Well, I may have collected on the part of Fisher Construction the payment that was due. I can't recall that.

Q. You don't remember him giving you any money except for Fisher Construction Company?

A. No, sir.

Q. And for what was that money given? What contract?

A. In December 1953—that reminds me—I said January of 1953 about the purchase of those windows. It was January 1954. In December 1953 we had a high wave which broke the walls on Mr. Bogovich's place of business and the insurance company told us to go ahead and fix it. At that time Mr. Bogovich talked to me about the purchase of the

(Testimony of C. W. Lerche.)

windows and I think it was in January of the following year I actually placed the order [35] for it.

Q. You think you placed the order in January 1954? A. Yes, sir.

Q. Now this money that you were given—that was for Fisher Construction?

A. And it was transmitted to Fisher Construction Company.

Q. And it was for the repair of Mr. Bogovich's building? A. Yes.

Q. And that was the only money you ever received from Mr. Bogovich? A. Yes.

Q. You are sure about that?

A. Yes, I am sure.

Q. Mr. Bogovich never gave you any money to pay for materials that were ordered and then you didn't pay for them when they arrived?

A. No, sir.

Q. You have testified that in February of 1953 you received a statement of account from Mr. Warashina, the accountant for Fisher Construction Company, and that's the paper that you looked at during your direct examination?

A. That is right.

Q. Was that addressed to you?

A. It was addressed to me personally.

Q. Are you a shareholder in Fisher Construction Company, Ltd.? [36]

A. No, sir.

Q. Are you a director?

(Testimony of C. W. Lerche.)

A. At the time it was considered that I was to become a director.

Q. And how did you happen to get this understanding? A. What?

Q. About being a director?

A. You personally drew up the papers for it.

Q. What papers?

A. The incorporation papers.

Q. For Fisher Construction Company, Ltd.?

A. For Fisher Construction, Guam, Ltd.

Q. Isn't it true that the corporation was never formed? A. That is right.

Q. Now you have testified that you drew \$400 from this Modern Builders Supply?

A. Modern Builders, Inc.

Q. Now with reference to the books of Fisher Construction Company, Ltd. you have testified that you made certain notes or journal entries, is that correct? A. No.

Q. Would you testify what knowledge you have of the records of the operations of Fisher Construction?

A. I testified I made certain notes of cost of labor and materials for my own records in the supervision of jobs. As to [37] the general books of Fisher Construction outside of a short period in 1952 when they were trying to set up the books here and they were subsequently transferred to Honolulu, I have had no access or records of the books of Fisher Construction Company.

Q. Isn't it true that when a job is completed

(Testimony of C. W. Lerche.)

there are always returns, materials left over, materials which are returned to the company?

A. At times, yes.

Q. You mean on some occasions there are no materials left over? A. That is right.

Q. Does that happen very frequently?

A. If your buying is right you shouldn't have any surplus.

Q. You mean regardless of the size of the contract if the material is ordered correctly, you have nothing left over?

A. No, if it is a big job there will be form lumber and stuff like that left over.

Q. What kind of a job would there be no materials left over?

A. Oh, 5 to \$10,000, something like that.

Q. I see. Did you always return the materials on contracts under your field supervision when they were completed? A. Yea.

Mr. Turner: If I remember correctly, your Honor, one of the issues, while perhaps not specifically stated or specifically set forth in the pretrial order, was the question of whether [38] Mr. Lerche paid his bills at the time they were due, personal bills.

The Court: Well, of course, that was raised as part of the defense.

Mr. Turner: Yes, I wonder if since Mr. Lerche is now on the stand I might go into that now and save time. It is outside the scope of direct and that is why I raise the question.

(Testimony of C. W. Lerche.)

The Court: I think so. We will take a ten-minute recess at the present time.

(The court recessed at 10:45 a.m. and reconvened at 10:55 a.m., April 11, 1955.)

The Court: Did you want the record to show, Mr. Crain, any objection to Mr. Turner's request?

Mr. Crain: I do object to it. I feel it is improper.

The Court: Just in making the court's ruling, the agreement of September 29 provides that "The entire agreement is based on you giving the business your undivided attention and maintaining a high personal standing in the community," and on direct examination the witness testified he complied with his contract in all respects. The only question of going into unpaid bills and so forth is maintaining a proper standing in the community.

Q. (By Mr. Turner): Mr. Lerche, during the time you were in the employ of Fisher Construction Company, Ltd., that is from September 29, 1952 until May 24, 1954, did you pay your [39] personal bills as they became due?

A. Within reason, yes.

Q. What do you mean "within reason?"

A. A bill may be due on the 10th of the month and it may not be paid until the 15th or 20th. I still say it is within reason.

Q. Did you have any bills you were unable to pay within five or seven days after they were presented to you? A. Yes, sir.

Q. What were those bills?

Mr. Crain: If the court please, if counsel has

(Testimony of C. W. Lerche.)

records of unpaid bills I think the proper cross-examination would be to bring out those bills specifically rather than these shotgun tactics.

The Court: Well, this is cross-examination.

Mr. Turner: He knows what he didn't pay.

Q. (By Mr. Turner): Did you lease a house from Mrs. Rosario? A. Did I what?

Q. Did you lease a residence from Mrs. Rosario?

A. Yes.

Q. During the period you referred to that you were employed by Fisher Construction Company, Ltd., did you pay your rent on time?

A. Yes and no. When it became a question as to Mrs. Rosario's not acting in accordance with the terms of the lease [40] in extending the option, I refused to pay rent until such time as the court had a chance to decide on it.

Q. And when did this option question arise?

A. The first time it arose was in December of '53.

Q. Did you keep your rental payments current and pay them on time during the period from September 29, 1952 until that option question arose?

A. Yes except for one period when there was the question of Mrs. Rosario owing for water lines and installation on the job.

Q. Did you borrow \$100 from Mr. James Morrison while you were working for Fisher Construction, Ltd.? A. Yes, sir.

Q. Has that been paid? A. No, sir.

Q. Do you have any other unpaid bills that have been accumulated during that period of time?

(Testimony of C. W. Lerche.)

A. I can't answer that.

Q. What do you mean you can't answer it?

A. I don't recollect.

Q. Do you mean you paid—other than James Morrison—you paid all of your personal bills when they became due and owing?

Mr. Crain: Are you speaking of the period he was employed by Fisher? [41]

Mr. Turner: That is right. That is always the period to which I am referring.

A. I think so.

Q. (By Mr. Turner): Are you sure?

A. Well, if I was sure I would say so.

Q. You testified that you were using a car of the company. Was that a Buick? A. Yes.

Q. And you lent it to someone and it was damaged? A. That is right.

Q. Did you have authority to lend that car to that person?

A. No, I found out later I didn't. As a matter of fact I considered it at the moment a matter of complete inconsequence because he was just going a mile up the road to collect a bill and come right back and his own car was tied up at the time.

Q. You testified that you paid for the repairs.

A. Yes, sir.

Q. Did you pay for them at the time they were made or did Fisher have to advance for the payment? A. No.

Q. You paid it all yourself and Fisher did not make any advance for repairs? A. No.

(Testimony of C. W. Lerche.)

Q. What do you mean? The company did not make any advance? A. No. [42]

Q. Now after the Buick was damaged what automobile did you use in your company affairs?

A. I used my own DeSoto.

Q. And did the company furnish any gasoline to you for your own personal car after that time?

A. Yes, sir, gas and oil.

Q. All of the gas and all of the oil you used?

A. That is right.

Q. What about repairs and maintenance for your automobile? Was that furnished by the company?

A. In all instances but one where I paid my own bill.

Q. What about tires? Were they furnished by the company? A. Yes.

Q. Was there any painting or any repairs done on your car?

A. No, the painting I took care of myself.

Q. You paid for it yourself? A. Yes.

Mr. Turner: That is all.

Redirect Examination

Q. (By Mr. Crain): Are you still living on the Rosario property? A. Yes, sir.

Q. Do you have a satisfactory arrangement at this time between yourself and Mrs. Rosario?

A. I have a new lease for three years. [43]

Q. Who drew the original lease that you had with Mrs. Rosario?

(Testimony of C. W. Lerche.)

A. Well, that goes back a long time. The original lease was drawn by Mr. MacArthy and in this lease it stated clearly that I was to have two periods of three years each options after the completion of the first three-year period.

Q. Did you have any subsequent lease drawn?

A. Yes, there was a subsequent lease drawn which was executed in the early part of July, nine months after I moved in on the property.

Q. Who drew that lease?

A. I believe Mr. Turner did.

Q. Were the terms of that lease the subject of the lawsuit against you by Mrs. Rosario?

Q. But that matter has now been settled and you have a new lease with Mrs. Rosario?

A. Yes.

A. I made a countersuit of \$8,000 and it was settled out of court before it came into the District Court and the new arrangement was that I got a new lease for three years.

Q. At the time you went to work for Fisher Construction Company you were informed that there was to be a new company created to be called Fisher Construction Company, Guam, Ltd.?

A. At that time or shortly after.

Q. Did you ever confer with Mr. Turner concerning the [44] details of the formation of that company?

A. Yes, I believe I had a couple of telephone conversations and also one personal call to Mr. Turner's in relation to that.

(Testimony of C. W. Lerche.)

Q. Was it indicated that you were to be an officer in that company? A. Yes.

Q. Was that company ever actually formed?

A. No.

Q. During the time that you were employed by Fisher Construction Company did you ever have any occasion where you were required to pay bills for Mr. Fisher or for the company?

A. At one time it became necessary in the daily operation to buy materials as I needed them on my personal check and be reimbursed by the company.

Q. Why was that necessary?

A. Their credit was cut off.

Mr. Turner: Whose credit? I am not clear.

A. Fisher's credit.

Q. (By Mr. Crain): With what suppliers was Fisher's credit cut off?

A. Pacific Construction Company.

Q. In other words, you were buying materials for cash out of your own pocket to be used on Fisher's jobs? A. Yes.

Q. And to be reimbursed by Fisher, is that correct? [45] A. Yes.

Mr. Crain: I have no other questions.

Recross Examination

Mr. Turner: It is immaterial but I want to clarify one question on that lease, your Honor.

Q. (By Mr. Turner): Isn't it true that lease you signed, the second lease with Mrs. Rosario was

(Testimony of C. W. Lerche.)

prepared by an adviser to her and she would not change the terms of the lease?

A. By an adviser to her?

Q. Yes and she wouldn't change the terms of the proposed lease and that was why it was typed as it was.

A. That I can't tell you, Mr. Turner, because I was not in on those conversations, but I do know the day we walked out of Mrs. Rosario's home down here I told you that that lease was not the terms I agreed upon and you agreed to send her a letter stating that there was going to be, without equivocation, two distinct terms of option.

Q. That is clarification but she wouldn't change the terms of the lease?

A. That may be so.

Q. That was why it was signed because otherwise she wouldn't have given you a lease. Now with reference to cash payments you made out of your own pocket, isn't it true that Fisher Construction Company gave you the money before you bought [46] those materials for cash?

A. No, I issued my check for day-to-day purchases and the following day I went in and got a check from Mr. Morrison.

Mr. Turner: That is all.

Mr. Crain: I have no other questions.

Examination by the Court

Q. I want to ask you, Mr. Lerche, in this letter you received you were employed as administrator?

(Testimony of C. W. Lerche.)

A. That is right.

Q. Now to me an administrator is one who has overall responsibility for all operations included in the business. Now in the construction business does it have a different meaning?

A. I don't know but the instructions were I was to operate on the same level as Mr. Haley.

Q. Now ordinarily wouldn't an administrator have charge of a construction superintendent?

A. I can't talk in generalities because I don't know what meaning people put on the word. The only thing I can tell you I was hired on the same level as Mr. Haley and personally I think that the word "contract administrator" isn't applied to it because that was Mr. Fisher's term of the name of the position.

Q. But in your capacity would you estimate jobs?

A. At that time most of the jobs were estimated in Honolulu.

Q. But did you furnish the basic data for the estimates? [47]

A. No, the plans were sent back to Honolulu and they were estimated back there.

Q. Did you make recommendations?

A. No.

Q. Or give them any estimates?

A. At a subsequent date, yes, but not in the first year, I would say.

Q. Who was responsible for the purchase of materials?

(Testimony of C. W. Lerche.)

A. Even in those days all materials were bought in Honolulu.

Q. But who furnished the requisitions for those materials?

A. Honolulu office on the strength of the bids; they go back there.

Q. Who handled the payrolls?

A. Payrolls were handled by Mr. Haley and the the secretary for the office, Mrs. Rogers.

Q. Were those operations under you?

A. I didn't sign any payroll checks. The payroll checks were all signed by Mr. Haley.

Q. Mr. Lerche, just what did you administer in your capacity as either administrator or contract administrator?

A. What I mostly did was to see that money was collected, prepare monthly estimates for the collection of this money. In other words, so many percentages of certain operations were completed. On the basis of that we billed the Air Force or the private owners, and to see that that money was collected and [48] deposited in the bank.

Q. Then were your overall responsibilities limited to the extent that it was your job to see that the work was being done on schedule and to bill the debtors under the contract in accordance with the contract and to collect the money?

A. It wasn't even my responsibility to see that the work was done on time. It was just my responsibility to collect for whatever work had been performed.

(Testimony of C. W. Lerche.)

Q. You had no responsibility for the supervision of construction?

A. No, sir, that was Mr. Haley's.

Q. Well, if your responsibility, Mr. Lerche, was limited in that way, where was an automobile needed?

A. Well, I had to go to the Air Forces at the rate of at least three times a week at Anderson and there is a lot of running around—the government offices and plans to be picked up and so on and so forth.

Q. But your DeSoto was also used for your family purposes, was it not?

A. The DeSoto was mine.

Q. Yes and used for family purposes?

A. Yes.

Q. And you stated they furnished you gas and oil, maintenance and tires. Was there any breakdown in furnishing that between your family use and the company use? [49]

A. No, except that on week ends I would buy my own gas. I wouldn't draw it from the company.

Q. But if you had to have tires and maintenance, Mr. Lerche, there was no way of making any distinction, was there, between——

A. No but there is a certain depreciation of an automobile over a two-year period.

Q. That takes place when it is a family automobile, regardless, doesn't it?

A. It doesn't take place quite as rapidly as when you use it in your business.

The Court: I have no further questions. You may be excused.

Mr. Crain: Mr. Warashima.

HOWARD H. WARASHIMA

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Crain): State your full name please.

A. Howard H. Warashima.

Q. What is your home address?

A. 1822 Beckley St., Honolulu, Hawaii.

Q. Are you employed by Fisher Construction Company?

A. That is right.

Q. Full time? [50]

A. No, sir.

Q. Are you in business in Honolulu as an accountant?

A. That is right.

Q. Could you give the court an idea, Mr. Warashima as to what percentage of your time you spend on the books of Fisher Construction Company?

A. Well, it's pretty hard to say what percentage of time because it depends on the time of the year as well as the amount of work that is involved.

Mr. Turner: I didn't hear the last part of his answer.

(The reporter read the last answer.)

Q. (By Mr. Crain): Well, is it correct to state that Fisher is just one of a number of clients you have in your accounting business?

A. That is right.

Q. How long have you had this account?

(Testimony of Howard H. Warashima.)

A. Since the inception of the business of Fisher Construction Company, June of 1950.

Q. You say since June of 1950?

A. That is right.

Q. That's when the company went into business in Honolulu, is that correct?

A. That is right.

Q. Can you tell us when the company went in business in Guam? [51]

A. I can't very well tell you the exact date. It was some time in—well, actually they started the contracts in June of 1950, I believe it was. No, '52; I am sorry.

Q. In Guam?

A. That is right. Prior to that, of course, Mr. Fisher made a couple of trips out here.

Q. Have you kept all of the books of the company since it was created?

A. Exactly what do you mean "kept the books"? You mean made all the entries or anything like that?

Q. In your capacity as accountant what are your duties insofar as Fisher Construction Company books are concerned?

A. Well, that includes doing the office routine and handling the records and entering the records and books and my job is to see that it is entered into the proper accounts and to make the tax returns, as well as giving out financial statements.

Q. In giving out the financial statement did you do audits of the company's books?

(Testimony of Howard H. Warashima.)

A. No, I don't make a complete audit as far as that goes because when you say audit it depends on what type you mean. Exactly what do you mean by "audit?" A complete audit? You mean go over everything?

Q. Yes.

A. I just verify things to the satisfaction of myself that it is entered in the proper account, that the supporting [52] vouchers are there.

Q. Are the Guam books kept as a part of the overall Fisher Construction Company operations?

A. No, sir.

Q. They are separate?

A. That is right.

Q. Have they been separate ever since the Guam operation started? A. That is right.

Q. Where is the supporting data kept?

A. It's in the Guam office mainly but some of them have been sent to Honolulu because when Mr. Fisher is in Honolulu there are certain things he would like to check.

Q. So part of the supporting data for the books are in Honolulu and part is in Guam, is that right?

A. Well, as far as all the stubs of checks that are written and the contracts are in Guam.

Q. Well, what's in Honolulu?

A. As I can recall there is about three months' bank statements that I reconciled in Honolulu and a few of the invoices that were paid by the Honolulu office on the account of Guam.

Q. Isn't it a fact, Mr. Warashima, that practi-

(Testimony of Howard H. Warashima.)

cally all of the purchases of material for use of the Guam operation are made in Honolulu? [53]

A. No, it's not practically all because we have done quite a bit of buying here as well as from the mainland.

Q. A considerable amount is purchased in Honolulu, too, is that right?

A. Purchased from firms in Honolulu but purchase orders given from here and it's earmarked as Guam jobs.

Q. Has there ever been a complete audit of the Fisher Construction Company books since its inception?

Mr. Turner: You mean Guam?

Mr. Crain: No, Fisher Construction.

A. No, there has never been because it's impossible to do a complete audit without an exorbitant price, especially in the construction business because it involves going on the jobs to see the percentage of completion and not every job has an engineer, I mean an architect involved so it's a matter of a person to go out and satisfy himself, who is not an engineer himself. He is an accountant and it is almost impossible.

Q. In other words, there has never been a complete audit of the Fisher Construction Company books? A. No.

Q. Has there ever been a complete audit of the Guam operation since its inception?

A. Well, I don't know what you mean by "complete audit," because as I have explained to you I

(Testimony of Howard H. Warashima.)

have verified the entries in the books and supporting data. [54]

Q. Here or in Honolulu? A. In Guam.

Q. When?

A. I was here in September of '53 and they sent me some records back to be checked and they were returned up until January of '53, I mean '54. I am sorry.

Q. In other words, even your only casual audit of Guam books does not extend beyond January of '54, is that right?

A. No, it doesn't.

Q. You have had no overall supervision of the Guam books since that date?

A. No, I haven't. There is a Mr. Robert C. Miller who has done the work.

Q. Have you had any occasion to verify any of the work that he has done?

A. Well, that is what I am here for now.

Q. Has his work covered the period from January 1, 1954 to the present time?

A. Not quite to the present time. We closed the books as of the fiscal year, May 31, 1954, and he has made some entries in the books from June to December of '54.

Q. He has made some entries?

A. Yes, not complete entries.

Q. And you are in the process of looking over Miller's work at this time, is that right? [55]

A. That is right.

Q. Now isn't it a fact that at least a part of

(Testimony of Howard H. Warashima.)

these books which were brought into Guam by you last Wednesday night have been in Honolulu since last November?

A. Sometime in November.

Q. They have been there continuously, is that right?

A. (Nods head).

Q. What did those books consist of?

A. Journal and ledger.

Q. In other words anyone trying to examine the books in Guam would have had only certain supporting data to look at? They would not have had the advantage of seeing the journal and ledger?

A. Well, naturally because if it's in Honolulu you can't see it.

Q. And it's been there since November?

A. Yes.

Q. I believe you stated previously that you have prepared the tax returns for Fisher Construction Company?

A. Yes, I have.

Q. Does that include the preparation of both federal tax returns and Guam tax returns?

A. Well, Guam tax returns as far as the fiscal year ending in '53 it has been filed but for the fiscal year ending '54, it has not been, and I am here to find out exactly how the [56] statute reads so that I can—you see, it's not very clear as far as the Guam corporation tax statute goes, as I see it, whether outside operations should be included in the return or should be left out but to be incorporated in the balance sheet of the tax returns, and the fact that there was a loss in the fiscal year ending May

(Testimony of Howard H. Warashima.)

31, '54, I did not ask for an extension of time because of no tax and also I took sick since last July and the final federal return was filed on November 15 and I got an extension on that and I was planning on the Guam trip some time in early December, but because of my health I was not able to come down.

Q. In other words, you filed a federal return for the company for the fiscal year of '54, ending May 31, on November 15, 1954?

A. That is right. That is the date I got an extension, too.

Q. But for that same fiscal year you have filed no Guam return?

A. No, I haven't yet.

Q. Is it your understanding that the Internal Revenue Code as applied to corporations is different for Guam than it is for the federal?

A. Well, as far as I see it—I mean I don't know enough about the Guam set-up in regard to Section 251 whether it is reversible in Guam. In 1954 the code number was changed to 931, that is the possessions of the United States. If you are [57] doing business in the Territory of Hawaii and business in the possessions there are certain excludable sections. Whether that is reversed in Guam or not I don't know. That is one of the things I want to straighten out here.

Q. Have you any legal opinion by anyone on that?

A. No, they are vague about that, too.

(Testimony of Howard H. Warashima.)

The Court: We are not getting into income tax, are we? The legality of Section 31?

Mr. Turner: I am not interested in that. I am interested in the fact that Guam should be different from the federal——

The Court: He is supported in that view by some of our local lawyers.

Mr. Crain: Yes, he is. He can't read the mirror——

Q. (By Mr. Crain): What about the gross receipts taxes due and payable to the Government of Guam?

A. That's another thing; I will have to check with the Guam government office as well as our office here.

Q. When were the last gross receipts taxes paid by Fisher Construction Company to the government of Guam?

A. I don't know. In fact I was in the process of trying to look into that.

Q. Would the books reflect it?

A. I am checking the books now.

Q. I would appreciate it.

A. I mean I am checking the books at the office right now [58] to see what has been done and what has been filed. I mean I have been here such a short period of time I haven't been able to go through the books.

Q. You had them in Honolulu before you brought them out here.

(Testimony of Howard H. Warashima.)

A. No, I saw a return over here. I came across one in May 1954.

Q. Isn't it a fact that the last gross receipts filed with the government of Guam was in February of last year? A. I don't know.

Q. Wouldn't your books show it?

A. I am checking Mr. Robert Miller's work now.

Q. Wouldn't it show?

A. Well, I am trying to find out. I haven't seen the checks yet. You want me to go over all that right now to see whether there was any check made to the government of Guam since February last year?

Q. Is that the only way you can check?

A. That is the only way I can see right now.

Q. You haven't checked that point since you arrived?

A. No. If you had told me to I would have done it—gone over the office records.

Q. To your knowledge has there been any request for extension of time to figure gross receipts tax returns?

A. I believe this office did. [59]

Q. But you don't know that they have been paid, is that right?

A. No, and another thing on this gross receipts tax that I have been overlooking at the Guam branch is that prior to July '53 there was some provision in there if you did government contracts, the materials that were bought is deductible, and I wanted to get that thing straightened out.

(Testimony of Howard H. Warashima.)

Q. Well, I am more interested in the last year as to whether the company has filed gross receipts tax returns and paid any gross receipts tax?

A. That I haven't found out yet.

Q. You don't know?

A. (Shakes head).

Q. Did the Fisher Construction Company, Ltd. show their gross profit on the return that was filed to the United States?

Mr. Turner: It should be limited to Guam.

Mr. Crain: The return was filed to the United States government and I think we are entitled to know whether it showed profit or loss.

A. Well, I have a profit and loss statement if you want to see the Guam operation.

Q. (By Mr. Crain): I asked you a simple question——

The Court: Well, now the objection on that is that it's of no help to us in construing this particular agreement which is limited to the Guam operation as to what they did, [60] and the witness has said he has a profit and loss statement.

Q. (By Mr. Crain): For general operation or the Guam operation?

A. Guam operation.

Mr. Crain: But they filed a federal tax return which included the Guam operation.

The Court: What we are interested in here is Guam, just Guam.

Mr. Crain: But I think we pretty well proved

(Testimony of Howard H. Warashima.)

we have nothing for Guam. They haven't filed any tax for 18 months.

The Court: He said he had a profit and loss statement.

Q. (By Mr. Crain): Is that a current profit and loss statement?

A. For the two years ending May 31, 1953 and May 31, 1954 and we have a ledger as well as the journal here that covers these two periods.

Q. Were these statements consolidated with the statement for the entire company operation in preparing your federal tax return?

A. No, well, it's included in the return. When I filed the return the Guam operation is attached to the federal return.

Q. These are attached as they are?

A. That is right.

Q. I believe you told me that at the time you filed the federal return they went ahead and audited the return at that [61] time, is that right?

A. Audited it at that time?

Q. Yes.

A. No, what I stated was that because of the huge loss of the Guam operation as of May 31, 1953 we filed in the carry-back provision and the federal has come in and has given us the refund for the carry-back and Mrs.—I forget her name—the Internal Revenue agent, came over and looked over the books.

Q. What was the net loss sustained by the company in Guam in 1953? A. \$156,275.75.

(Testimony of Howard H. Warashima.)

Q. What was it for 1954?

A. 1954 is \$51,084.22.

Q. In your accounting procedure on Fisher Construction Company books do you keep a cost analysis of jobs?

A. Well, Mr. Lerche will be able to answer that.

Q. I am asking you, Mr. Warashima. You were the one who set the books up.

A. The books were set up in the manner that cost per job should be shown but when I came over and checked them over—well, Mr. Lerche was there too and he knows it too that some purchase orders did not state what job they were. Well, naturally when I questioned him he didn't know exactly what jobs and there was no in-and-out warehouse transactions. Naturally [62] on jobs you will have excess that should be returned to the warehouse and then taken out on the next job when there was the same type of material needed, but those transactions were never recorded so it was almost impossible—

The Court: Do I understand you to say that they did not maintain a warehouse inventory account?

A. No, they did not so whenever it was on invoices and purchase order where it showed the job numbers and all that I put it in the cost account and, for instance, if it's in the material account of the job numbers and if the material is purchased for that job, it is entered in that job, but there was lots of them I did not know what job to charge.

(Testimony of Howard H. Warashima.)

Q. Are you speaking of your visit to Guam in 1953? Is that when you discovered that situation?

A. That was the situation.

Q. How long were you here in September 1953?

A. Well, I was here for about two weeks in late August, '53. I spent about two weeks then I went to the Orient and got back here and spent about ten days here again.

Q. Well, did you set up the books for the Guam operation?

A. That is right, I did.

Q. You set them up from Honolulu?

A. No, not from Honolulu. I was out in '52, June of '52.

Q. You were here in June of '52?

A. That is right, but in setting up the books and carrying [63] them out you have to have cooperation from the management as I see it——

Q. Well at the time you came here in June, 1952 who was the manager?

A. I think it was Mr. Haley; I am not sure.

Q. How long were you here at that time?

A. I can't—oh, just about a week, I believe.

Q. Was that sufficient time to set the books up and train someone to take care of them in your absence?

A. Well, I believe it was. I left notations and memoranda on what should be done.

Q. Did you train a man at that time?

A. No, I did not. What do you mean by "train a man"?

(Testimony of Howard H. Warashima.)

Q. Did you introduce a bookkeeper to the books that you had set up?

A. To the person who was in the office, yes.

Q. Who was that?

A. I think it was Harriet Rogers.

Q. Harry Rogers?

A. Harriet Rogers; it was Mrs. Rogers.

Q. Was she still here in September '53, August or September when you came back?

A. Yes, she was.

Q. Was she still keeping the books?

A. Yes, she was, with the help of Mr. Lim. [64]

Q. Had you had any occasion between June of 1952 and September of 1953 to review the work that was being done on the books in Guam?

A. Yes, I was here, in, I believe it was December '52.

Q. '53 you mean? A. '52.

Q. Did you find that they were not keeping the books properly at that time?

A. I went over with Mr. Lerche, I believe it was. I pointed out what wasn't being done.

Q. Did you go over them with Mrs. Rogers and/or Mr. Lim? A. I did.

Q. But when you came back in September '53 you found they were still not keeping them?

A. Well, as far as putting down the company job numbers on some of the purchases, no.

Q. Did you conduct any correspondence between yourself in Honolulu and the Guam office concern-

(Testimony of Howard H. Warashima.)

ing improper methods of posting books or maintaining records?

A. Well, the books were kept here. When I came here, yes, I did.

Q. Is that the only time you saw the books in those days was when you came here?

A. That is right.

Q. When did you prepare the tax returns for fiscal '53? [65]

A. It was within the period of about August.

Q. In other words, you had to have the books in Honolulu at that time, is that right?

A. I guess I must have filed it later then after I had been back. I am not sure when I filed it. I have the records in my office. I did go through the books. I am sorry if I stated I hadn't seen it prior to that. In preparing this return I did go over the books myself.

Q. In other words, they were shipped to you in Honolulu?

A. I am hazy about whether it was shipped when I was here in August or whether it was after my return in September when I prepared that or not; I am not too sure.

Q. You stated that proper cost records were not kept on the jobs, is that right?

A. That is right.

Q. Was that a serious matter in that on practically none of the jobs were they able to verify their cost?

A. I wouldn't say practically every job.

(Testimony of Howard H. Warashima.)

Q. Could you tell us what jobs you had in mind that you were unable to verify their cost?

A. No, I can't. I don't know which job it is but the fact the job numbers have not been put on but naturally it's entered in the material and cost supply account in the books, therefore——

The Court: Let me see if we can make this clear. You got [66] a requisition for supplies without the job number on it? A. Yes.

The Court: You entered the supplies and you had to debit some account. You debited your material and supply account but you didn't debit any particular job account?

A. That is right, the distribution of it.

The Court: The distribution to any particular job, but it showed up in the total?

A. That is right it shows up in the total and as a part of the cost.

Q. (By Mr. Crain): Is it correct there has been no gross receipts tax for the past or set up for the past two years for the Guam operation?

A. I did set it up in '53, the gross receipts reserve.

Q. Does that show on the fiscal '54 statement? You say at the end of '53 you set it up?

A. No, when I say end I mean the fiscal year ending May 31, '53. Yes, I have a gross receipts tax down here.

Q. That is for the end of '53?

A. That is right.

Q. Is that figure \$10,175.85?

(Testimony of Howard H. Warashima.)

A. Which one?

Q. Is that the proper tax on a gross income of \$511,733.

A. There was a few exclusions. Two percent of that would come out approximately \$10,000. [67]

Q. Is there a gross receipts reserve set up for fiscal '54?

A. I don't see it here. I don't know whether he put it into some other account.

Q. Who do you mean by "he"?

A. Mr. Miller: I don't know whether he has some in taxes and license account or not. Yes, \$1,941.

Q. That is on a gross income of what?

A. \$304,000.

Q. Are the figures that you have in your hands here for fiscal '54 going to be the basis on which you will eventually file an income tax return with the government of Guam for the Guam operations of Fisher Construction?

A. I cannot tell you that because as I didn't have enough time yet to go over his work—whether it will be or not I cannot say.

Q. Was a return filed for fiscal '53 to the government of Guam? A. That is right.

Q. Was it filed on the basis of those figures there? A. That is right, \$156,000 loss.

Q. That return has never been audited by the government of Guam? A. No, it has not.

Mr. Crain: I have no other questions. [66]

Mr. Turner: No questions, your Honor.

(Testimony of Howard H. Warashima.)

Examination by the Court

Q. May I see the statement of the witness, please? A. Yes, sir.

Q. Now as I understand it you prepared this profit and loss statement?

A. For the fiscal year ending May 31, 1953, I did, sir.

Q. And did Mr. Miller prepare the one for '54?

A. That is right.

Q. And the statement that you prepared up until May 31, 1953 showed a net loss on Guam operations of \$156,275.75? A. That is right.

Q. And as to the period ending May 31, 1954 you cannot of your own knowledge state that this is a correct profit and loss statement until you have an opportunity to check——

A. That is right.

The Court: The books which Mr. Miller kept during that period. Very well, that is perfectly clear to me. Thank you very much. Gentlemen, it's nearly 12 o'clock. We will recess until 1:30.

(The court recessed at 11:55 a.m., April 11, 1955 and reconvened at 1:30 p.m., April 11, 1955.)

The Court: Call your next witness.

Mr. Crain: Mr. Morrison, please. I would like the record to show that Mr. Morrison is being called as an adverse witness. [69]

The Court: Very well. Any objection?

Mr. Turner: No objection.

JAMES M. MORRISON

called as an adverse witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Crain): State your full name please.

A. James M. Morrison.

Q. Where do you live? A. Agana.

Q. By whom are you employed?

A. Fisher Construction Company.

Q. Are you in fact a vice president of Fisher Construction Company? A. That is right.

Q. When did you come to Guam for this company, Mr. Morrison?

A. Originally in January 1953 and then I was back in Honolulu for a couple of months then I came back here in March to stay.

Q. You have been vice president of the company since you came here?

A. That is correct.

Q. What is the nature of your duties insofar as the Guam operation of the company is concerned?

A. Well, I am manager of Guam operations.

Q. Have you been in that capacity since you came here? A. That is correct.

Q. As the Guam manager have the books of the company pertaining to Guam been under your custody and control during that time?

A. More or less.

Q. The keeping of those books has been under your supervision, is that correct?

(Testimony of James M. Morrison.)

A. Actually they have been under Mr. Warashima's direction more than my own.

Q. You have heard Mr. Warashima testify here this morning concerning those books?

A. Yes.

Q. It is my understanding that since you have been here the company has carried on two other joint ventures in connection with other companies, Koster and Whyte and Campbell Construction Company, is that right? A. That is right.

Q. The joint venture with Koster and Whyte has been completed for some time, is that correct?

A. It is physically completed; it hasn't been closed out.

Q. Has the company received any money on the Koster and Whyte job? A. Yes, it has. [71]

Q. Have the receipts from that job been included in the books of Fisher Construction Company, Guam, as we have seen them here today?

A. Well, I didn't see exactly what Mr. Warashima had but, yes, normally all of the receipts are included.

Q. Do you know how much Fisher Construction Company has received from the Fisher-Koster joint venture to this date?

A. Well, the best I could give you would be a guess.

Q. What would be your best guess?

Mr. Turner: I will object, your Honor.

Q. (By Mr. Crain): The gross contract price was \$1,200,000, as I recall it.

(Testimony of James M. Morrison.)

A. Yes, that is approximately right.

Mr. Turner: He said he would have to guess. I think that would be rather foolish to put that in the record.

Mr. Crain: He is the man in charge.

A. If I may say, your Honor——

The Court: You can't expect to have a person testify from memory as to what is contained in the books.

Q. (By Mr. Crain): If you had the books, Mr. Morrison, would you be able to give us the sum that has been paid into your company as a result of the completed work on the joint venture?

A. Yes.

Q. The books are here, aren't they? [72]

A. Well, they were. We thought you were through with that witness; he has gone back to work.

Mr. Crain: I don't think that is an assumption that could be taken. There was no request to excuse that witness, if the court please, or the books.

A. As a matter of fact even if I had the books, it would be a matter of hours to pick it out; it would be extremely difficult.

Q. (By Mr. Crain): Are you certain, Mr. Morrison, that the sums of money that have been paid in on the Koster-Whyte job to Fisher appear in the books at all? A. Oh, yes, I am.

Q. Were those sums all paid in the fiscal year 1954, your fiscal year, that is?

A. No, they were not.

(Testimony of James M. Morrison.)

Q. Well, when were they paid?

A. There was some slop-over to '55.

Q. But some were paid in fiscal '54?

A. Yes.

Q. Is the same true of the Fisher-Campbell job?
Have there been sums paid to Fisher?

A. Yes, there have been.

Q. And they appear on the Fisher-Guam books?

A. Yes, but I am just trying to remember whether there was any in fiscal '54. I think there would have been some. [73]

Q. You have no idea what they would be?

A. No, I haven't.

Q. But you are certain that the sums appear in balance sheets?

A. They appear as cash receipts as everything that comes in appears that way.

Q. What about cost on those jobs—labor cost, material cost—would they also be charged back to your books proportionately?

A. No, they would not.

Q. Only the cash receipts?

A. That is correct because they were set up as separate ventures.

Q. What cash did you receive from those jobs? Would it have been gross sums based upon payments of increments?

A. They were reimbursing our company for money we had spent for the joint venture. If I could explain a little bit—

Q. Yes.

(Testimony of James M. Morrison.)

A. We each carried our own payroll then the joint venture would reimburse each partner for the amount expended on payroll or on supplies or on equipment.

The Court: That necessitated, Mr. Morrison, a separate set of books for each venture?

A. Completely separate, yes.

Q. (By Mr. Crain): What I am getting at—I realize there [74] is a separate set of books for each venture, but is there also a tie-up with Fisher Construction Company books as of this time?

A. Yes, in this way—all the money that came into Fisher Construction had to be accounted for. It is picked up on our books, accounts receivable.

Q. And also the money spent for material and labor? A. Correct.

Q. Is that picked up on Fisher's books afterward or kept current?

A. It's current.

Mr. Crain: I have no other questions of Mr. Morrison, but I do feel that we should have Mr. Warashima or the books available because he was not excused.

The Court: So far as my file shows there was no subpoena issued for Mr. Warashima and the books.

Mr. Crain: That was because Mr. Turner said he would be available.

Mr. Turner: I can get him here again.

(Testimony of James M. Morrison.)

Cross Examination

Q. (By Mr. Turner): Did that particular venture make money or lose money?

Mr. Crain: I object. He doesn't even remember what money was gotten.

The Court: Mr. Crain's question was directed to amounts. Now Mr. Turner's question is, if the witness knows, did they [75] make money or lose money on that particular venture; not how much or how little but just a general conclusion which he may or may not——

A. May I make a slight explanation, your Honor, on that?

The Court: Yes, go ahead.

A. It's a rather difficult situation for me to tell you how much money we took in because all vendor's bills, material bills, were paid directly by the joint venture. We were reimbursed for money we put out as payroll, supplies furnished from our own inventory, or equipment we had on the job, and frankly, your Honor, I don't remember what percentage we would have supplied against what we bought from outside concerns.

The Court: In other words, you wore two hats, the joint venture in dealing with vendors as they would with a third person——

A. That is correct.

The Court: And all you know is what money you got for furnishing equipment, supplies or labor.

Q. (By Mr. Turner): I still want to know do you know whether or not you are able to state the

(Testimony of James M. Morrison.)

joint venture made money or lost money in connection with Koster and Whyte?

A. It hasn't been completely closed out and I think it is nip and tuck. I think we practically broke even.

Mr. Crain: May I ask one or two other questions, if the court please? [76]

The Court: Yes.

Redirect Examination

Q. (By Mr. Crain): This also comes into the realm of conjecture. Can you tell us what your weekly payroll, prior to March 31, 1954, on an average was? A. Prior to March '54?

Q. A year ago last month.

A. That was while the second increment at the hospital was underway. Our weekly payroll was running 4 to \$5,000.

Q. Had it been running that for a period of months prior to that date?

A. No, it hadn't. That was due to the heavy hiring of labor on the hospital job.

Q. When did that hiring start?

A. In a small way about March of '53 and it actually got to real heavy hiring where we had a hundred or two hundred men about May, I would say.

Q. Of '53? A. Yes.

Q. So that from May '53 through March '54 your payroll would be running between 4 and \$5,000 a week?

(Testimony of James M. Morrison.)

A. With fluctuations and reaching a peak, I would say, in August and as we finished concrete work and heavy construction men were laid off.

Q. When you say you reached a peak of 4 to \$5,000, would that be the peak or higher than that?

A. I think on occasion it would go higher than that when considerable overtime was involved.

Q. Give me an idea as to what would be the entire payroll from May '53 to March '54?

A. That would be hard to say because there were many other jobs at the same time.

Q. Well, based on the figures you have given us, Mr. Morrison, for the ten-month period ending March 31, 1954, the gross payroll was \$64,000?

A. Ten months? I think that would be almost about right, probably.

Q. Even though your payroll for many months was running 4 to \$5,000?

A. Yes, it started with a little, built up to a peak and slid off again rapidly.

Q. How long a period of time was it at that peak? In other words, you said you had close to 200 men on a job. How long a period of time, did you have 200 men on the job?

A. Well, now, wait a minute. I am confused a little bit. We were only carrying half the payroll. Koster-Whyte was paying the other half.

Q. That was residence construction?

A. Yes. [78]

Q. That was completed about March '54, wasn't it?

A. Yes.

(Testimony of James M. Morrison.)

Q. You paid half?

A. We paid our employees; Koster-Whyte paid their employees.

Q. How many employees did you have on the job during that period of time?

A. It seems to me that our peak that we had at one time was 134.

Q. That was both on the hospital job and other construction?

A. That is the total. I remember that I was amazed at one time that we were carrying that many people.

Q. 134 men, you say? At that peak it would run about \$5,000 a week?

A. Between 4 and 5. I think during all that period of time—now this is pure conjecture—I would hate to say for sure—it would be 36 or 37 on an average, a week.

Q. For how long a period did the peak last?

A. Oh, I don't know, possibly on the outside during the peak period it was maybe four, maybe three months.

Q. Do you feel that the figure for labor, \$64,000 for the period of ten months would be your total labor, including the hospital?

The Court: What figure are we talking about? Have you referred to this figure?

Mr. Crain: \$64,000. [79]

A. I am not familiar with the statement you are talking about.

Mr. Crain: Oh, I am sorry; it's your statement.

(Testimony of James M. Morrison.)

The Court: We do not have anything in evidence.

A. Oh, yes, this is the one Mr. Miller made. I recognize this. Well, I think it is undoubtedly correct. I had no question of it at the time I looked it over.

Mr. Crain: I have no other questions, your Honor.

Mr. Turner: I have no questions, your Honor.

The Court: Thank you, Mr. Morrison.

Mr. Crain: We rest.

Mr. Turner: Your Honor, I will move to dismiss count—dismiss the second cause of action, that is the net profit, on the grounds there has been no evidence to support the fact that there was a net profit.

The Court: What about No. 3?

Mr. Turner: Well, No. 3, your Honor, certainly I think the contract itself is clear on the matter of return transportation, and I think also on the question of the automobile, Mr. Lerche's statement shows an agreement to use his car and supply it with tires, gas, etc. after the wreck of the Buick, so I move to dismiss the third cause of action also.

The Court: Mr. Crain, argument?

Mr. Crain: I don't think that the second cause of action should be dismissed as yet. I think that the court is well [80] aware that the plaintiff has not had access to the books of this company as promised, and I think that the plaintiff has shown that he has tried in good faith to have access to the

books as they were promised, but the situation being as it is, this company hasn't filed any tax returns locally for over two years, for a period over two years. Apparently they haven't filed any returns in the period for the past 16 or 17 months although they have a fiscal year ending in May, and I think the plaintiff should be allowed to have a reasonable time to examine the books rather than be given a period of time from Thursday afternoon over Easter week end.

The Court: You have rested.

Mr. Crain: I didn't want to go to trial because of the situation concerning these books and I was told if I did go to trial if there was any indication, I would be allowed to look at the books later.

Mr. Turner: If the court please, the plaintiff put Mr. Warashima on as his own witness.

Mr. Crain: The most important thing Mr. Warashima said was he had the books in Honolulu since November until he landed in Guam last Wednesday night at midnight.

The Court: Well, more than that—he testified that up into fiscal '53 there was a loss of \$156,000.

Mr. Crain: There has not been any tax returns filed on that figure. He said he would not file any return based on [81] those figures.

The Court: He said he would get that straightened out while he was here.

Mr. Turner: That tax return he testified was filed on '53, \$156,000 loss.

The Court: But not '54. He did not keep the books in fiscal '54.

Mr. Crain: I think it is manifestly unfair to say that—while I had Mr. Warashima on the stand how could we reconcile our thoughts on these books over this past week end so we could intelligently interrogate Mr. Warashima?

The Court: Mr. Turner's point is that he was not an adverse witness.

Mr. Crain: I don't think I have to pin a label on him as adverse.

The Court: Certainly, Mr. Crain, in the absence of any other testimony to the contrary.

Mr. Crain: The only testimony Mr. Warashima was able to give the court was that he was down here trying to find out what was in the books himself.

The Court: In '54 he wanted to check profit and loss. Your second cause of action alleges that a profit of \$81,730 was made. There is no evidence whatever to support that.

Mr. Crain: I was not permitted to prepare my case on that point. [82]

The Court: Mr. Crain, the court understood you to say that you had rested.

Mr. Crain: I did but I rested on the basis of statements that were made to me by the court that in the event it was shown that these books had not been available and that we had not been able to make a proper study of them, and if the court felt that anything could be gained by examining the books, that we would be allowed to do so.

The Court: Mr. Crain, there was no such reservation made at the time you rested nor does the

court have any basis for assuming, in the light of the testimony here, that the books would show anything different from the things that were given.

Mr. Crain: In the light of the testimony I don't think it was even shown that there was a set of books available.

The Court: Well, your witness testified that he had the journal.

Mr. Crain: Yes, and he had them in Honolulu, too, during the five months they were supposed to be here.

Mr. Turner: And he had them here this morning.

Mr. Crain: Fine—how in the world is the plaintiff to examine a set of books in the courtroom, covering a period of two years? We can't examine them in the courtroom, and that was not the intent as to what would happen when we had the pretrial conference in January.

Mr. Turner: If I may state, Mr. Warashima arrived here [83] Wednesday—

Mr. Crain: Last Wednesday night.

Mr. Turner: Yes, all right—I think you met with him on Thursday afternoon. You and I met with him on Saturday and as far as Mr. Warashima is concerned he had answered any questions your accountant had.

Mr. Crain: That is fine but the books were supposed to be available for several months; they were available, actually, several hours.

Mr. Turner: The original entries were up there

at all times, the paid vouchers and so forth—just the journal was missing.

Mr. Crain: How could we examine them without the journal?

Mr. Turner: If your Honor please, the plaintiff said he was ready; he called his witnesses and he rested his case.

Mr. Crain: I agree; that's exactly the way it happened.

The Court: Where do we have this question of return transportation involved?

Mr. Turner: It's in the third cause of action, your Honor.

Mr. Crain: It's in the third paragraph of the letter agreement.

Mr. Turner: Actually, under the contract——

The Court: Of course, there is no evidence before me as to any return or that there was any intention to return, or as to what the cost would have been had there been. [84]

Mr. Turner: On top of that it is if the company went out of business.

The Court: I realize that but I don't think the company could escape responsibility. At the time, so far as the plaintiff is concerned, the company went out of business when he ceased to be connected with it involuntarily, but if that were the problem—of course, my problem is that I have no evidence whatever as to any damage on that point. I have no evidence that there was any intention to return to the mainland. I have no evidence as to what it would cost for the return. In fact I have no evi-

dence as to the size of the family even—what was involved—so surely I have no basis on which to consider that. I agree with the defendant as to the automobile. Certainly the maintenance and repairs and furnishing of tires and oil and gas is good and proper for the use of the car unless there was an understanding to the contrary, because if the plaintiff expects to recover for the car he would have put in the required vouchers currently so it could be charged against the operating expenses of the business. As a proper operating expense I don't think he could wait until the thing was all over—"Here I did these things. You didn't pay me for them although I didn't ask for it or expect it at the time." The defendant's motion for the dismissal of plaintiff's second and third causes of action is granted for the reason that the plaintiff has shown no breach of contract as regards those items or any damage flowing therefrom. [85] Now the first cause of action.

JAMES M. MORRISON

previously called as an adverse witness by the plaintiff, was called as a witness by the defendant, and having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Turner): Mr. Morrison, you previously testified that you came to Guam for Fisher Construction Company in March of 1953 and assumed active managership of the local operation?

A. That is correct.

(Testimony of James M. Morrison.)

Q. And did you have that position of manager from March, 1953 until May of 1954 when Mr. Lerche was discharged?

A. That is correct.

Q. Now during that period from March, 1953 until the end of May, 1954 what were Mr. Lerche's duties with the company?

A. When I first came over I put Mr. Lerche with the Fisher-Koster-Whyte joint venture preparing lists of materials to be purchased, various duties like that. Then we had him handling the small jobs that the company was doing. By small jobs I mean \$25,000, \$20,000 down. At one time or another I had him doing estimating.

Q. Do you remember any particular contracts that he estimated? A. Yes. [86]

Q. What were those contracts?

The Court: Now before Mr. Morrison continues—Mr. Morrison, he was employed, according to this letter, as administrator, was he, or when did he cease?

A. Well, your Honor, I thought that was a very nebulous term myself. His duties as administrator—well, it's rather difficult to explain—but frankly I think the title was a very poor one. His duties didn't correspond with that title and didn't at the time I took over.

The Court: In other words, he was employed as administrator but he never performed any duties as one? A. That is correct.

The Court: What you are testifying to now is

(Testimony of James M. Morrison.)

that he performed such duties as assigned by you?

A. Correct.

The Court: And he had nothing to do with the title of administrator? A. No.

Q. (By Mr. Turner): Do you remember what jobs he estimated specifically?

A. Well, I could name a few; I don't know whether I could name all of them.

Q. Name them.

A. Umatic School was the largest one he estimated for us.

Q. When was that job estimated? [87]

A. I think it was September but I am not—

Q. Of what year?

A. That would be September of '53, but I am not positive of that.

Q. Now did he do all of the estimating on that job or part of it?

A. He did all of it.

Q. And for what purpose was this estimate prepared? For bids? A. Yes, it was.

Q. Did you subsequently ascertain that there were any errors in the bid estimating?

A. Yes, the estimate that Mr. Lerche prepared—and this is memory again—I don't know the exact figures but this is substantially correct—was for \$131,000. Mr. Fisher went over the estimate and picked up a few items that were obviously omitted and brought the estimate up to 140 some odd dollars. After seeing that I went into it rather carefully in the short time available, and we actually

(Testimony of James M. Morrison.)

bid the job at \$158,000 and we were still \$5,000 under our closest competitor.

Q. When was that final bid submitted?

A. Mr. Turner, frankly I don't remember. I would have to check back. My memory is very hazy about that period of time.

Q. Was it in 1954 it was submitted?

A. No, it was submitted in the fall of '53. We actually [88] built it in '54.

Q. When did you start construction on the school?

A. I believe it was March 1954. It was originally scheduled for January then the government elected to do their own grading and that postponed it to March, I believe.

Q. Did you find any errors in Mr. Lerche's estimating on that job?

A. Yes, as I just pointed out, there were some extreme errors which would have made it extremely unprofitable if we had gone in on that figure.

Q. Do you remember what those errors were?

A. Yes, leaving out the equipment cost—that was one of the items we added in afterwards, and then by the same token we found out after we got the job under construction, various items of work simply weren't in the estimate.

Q. Such as what?

A. Well, I remember one specifically where he had in the estimate some \$3,000 for hardware that we ultimately paid \$7,600 for.

(Testimony of James M. Morrison.)

The Court: Do you remember when you bid that job?

A. I am sure it was September of '53, your Honor.

The Court: September of '53?

A. That is, approximately.

The Court: Now, Mr. Turner, do you have any right to go back of what you admitted here—that you increased Mr. Lerche's [89] salary from \$175 to \$200, I believe in February of '54?

Mr. Turner: Yes, I will tie this testimony in.

The Court: Now I don't see how you can go back of February '54 to try to show incompetency.

Mr. Turner: Right now, your Honor, this error of estimating on the Umatic School, as established, was obtained after February '54.

The Court: That isn't Mr. Morrison's testimony. His testimony is he bid the job in September 1953 and before they bid the job Mr. Fisher had gone over it and found numerous errors and Mr. Morrison had gone over it and increased it and they were still \$5,000 under the lowest bid.

A. That is correct but some of the things did not develop until after we got the thing underway.

The Court: Well, I think your testimony must be confined to that. I can't visualize you being in an equitable position to complain of an employee who was under contract to you and whose salary you voluntarily increased in February of '54——

Q. (By Mr. Turner): Let me ask you this question——

(Testimony of James M. Morrison.)

The Court: Though you weren't obligated by your contract to do so.

Q. (By Mr. Turner): Mr. Morrison, taking the date of February 1, 1954, as manager of this company did there come to your attention any errors in Mr. Lerche's estimating? A. Yes. [90]

Q. Or any failure to properly perform his duties that you assigned him? Will you tell the court.

A. That is correct.

Q. What errors were they?

Mr. Crain: I believe this is a leading question, if your Honor please.

Mr. Turner: Well, I don't have the answer to my question.

The Court: The witnesses so far, it seems to me, have been almost indiscriminately asked leading questions, so I don't see why he can't be asked. The question was "What errors were they?"

A. On Umatic School we actually started construction work in March and some of the errors and omissions that were in the original estimate didn't develop until we started to get the material for the job and found that some things had been estimated short and one of our prime concerns later on—it developed in the summer of '54 that these materials for the job had not been ordered. We had to fly, at rather heavy air freight cost, certain items that went into the job.

Q. What were they? Do you remember any of those?

A. Offhand I don't remember what they were,

(Testimony of James M. Morrison.)

Mr. Turner. I would have to refresh my memory on it. I know that we discovered very late in the game that certain items that were essential for the job just hadn't been ordered.

Q. Did you have any other complaints with reference to [91] Mr. Lerche's performance on the Umatic School job after February 1954?

A. One item I just remembered—something that had to be flown in. It was the astragals that go on the doors.

Mr. Crain: The what?

A. Astragals—a-s-t-r-a-g-a-l-s—the strip that goes between the doors, a weather strip between the doors to keep them from coming together.

Q. (By Mr. Turner): Did you have any other complaints of the way in which work was performed after February 1954?

A. The other job we had difficulty with was a very small job for the Coast Guard on Cocos Island in which all of the material was to have been purchased and assembled on the dock at Merizo ready to go over. Because it was such a small job you had to make one shipment out of it in order to make anything. As I remember it was pipe fittings, primarily, that weren't suitable for the job and also some galvanized iron spouts.

Q. Did that delay the job?

A. Yes, it did.

Q. In what way did it delay the job?

A. We had a crew all assembled ready to go. We had to disperse that crew and put them off on

(Testimony of James M. Morrison.)

something else until the necessary materials could be gotten in. I think we managed to get them locally, if I remember rightly, but at quite an additional cost. [92]

Q. Do you remember who was in charge of assembling materials on that job?

A. Mr. Lerche.

Q. And that was after February 1, 1954?

A. Yes, it was well along in the summer, it must have been, at least. In fact that was one of the straws that broke the camel's back really, that led up immediately to Mr. Lerche's being released. I don't know whether's it's ethical or not—let me ask, Mr. Turner, could I describe this in my own words without your asking questions?

Q. Yes.

A. When I first came over here Mr. Lerche was working for the company. I tried using him in various capacities because I had great hopes that he would be a satisfactory employee and one who would make money for us. He certainly seemed to have ability if he would just show it. In late '53 or early '54, I am not just sure when it was, he seemed to show signs of really doing a job for us. At that time we raised his salary and for a time everything went beautifully then we began discovering these errors. We weren't satisfied with the work he was doing. It was very difficult to find Mr. Lerche on any of our jobs. What he was doing we don't know, but Mr. Fisher and I discussed it and decided that

(Testimony of James M. Morrison.)

the time had come when Mr. Lerche was of no value to us and he wasn't earning money for us.

Q. Was that why he was discharged? [93]

A. Yes, if a man isn't earning money we can't keep him on the payroll.

Q. Do you remember Tom Curran's house?

A. That happened before I came. I am familiar with it.

Q. Do you remember the Atkins-Kroll job?

A. Yes.

Q. Were there any delays on that job?

A. Yes, there were delays in getting material. The job dragged out rather longer than it should have. The client was rather unhappy with the progress of the work.

Mr. Turner: Your witness.

Cross Examination

Q. (By Mr. Crain): You have stated that the reason that Mr. Lerche was discharged was that he was no longer making money for you?

A. That is correct.

Q. Is the inference correct then that at one time he was making money for the company?

A. There was a period of a few months, a period of three or four months when it appeared that he was.

Q. How could you tell, Mr. Morrison?

A. It's a rather nebulous thing in this business, but you know when a job is going well, Mr. Crain.

Q. On this Cocos Island job that you testified

(Testimony of James M. Morrison.)

about isn't it a fact that every day you had boats going from the mainland [94] to Cocos Island? Weren't there personnel going back and forth?

A. That is correct.

Q. And isn't it a fact that within a few days all the material that wasn't available at first was made available and carried over on the very same boats that the crews were going over in every day?

A. I believe we did.

Q. And Mr. Lerche procured that material?

A. Yes, he did.

Q. And the fact that some of the material went over two or three days later didn't slow the job down, did it? A. Yes, it did.

Q. How could it?

A. Because some of the things that were missing were some of the things that were needed.

Q. In the first two or three days?

A. Yes, in view of the fact that it was a very small job, the thing to do to make money is to put the things in there, do the job and get out.

Q. Wasn't what you inferred was that there was a great delay?

The Court: I didn't so understand, Mr. Crain. There was a temporary displacement of workers because of the lack of the material immediately but the principal inference was that the difference was that you had to buy local materials at greatly [95] increased cost.

Mr. Crain: I didn't get that inference.

A. Yes, that is right and on a small job like that

(Testimony of James M. Morrison.)

you just can't stand it. Every \$5.00 item means something.

Q. (By Mr. Crain): Isn't it a fact that the material missing was two items, plumbing fittings and iron spouts?

A. Those are the two things I remember.

Q. Now the plumbing was coming from Mr. Cook?

A. That I couldn't answer either because I don't know.

Q. You don't know then that it increased the cost of the job?

A. Yes, I can't prove it to you from the books, but I know any time a job doesn't move quickly it isn't making money.

Q. You were saying that the cost was more because the materials had to be procured locally. What I am saying is that they would have been procured locally anyway.

A. No, we buy from local vendors but they bring it in on special order for us from the mainland.

Q. You haven't always done that, have you?

A. We have except if we haven't the time to.

Q. Isn't it a fact over a period of months, many many months, you ordered locally and in small quantities from local material suppliers?

A. Yes, in many jobs because that is what the client wants; he wants it now. [96]

Q. Now what were the delays in receiving materials on the Atkins-Kroll job?

(Testimony of James M. Morrison.)

A. Specifically I don't remember; it's been some time back and I just don't recall.

Q. Who complained about the delay?

A. Mr. Van Sickland was manager at that time.

Q. He complained?

A. That is right.

Q. He is no longer here, is he?

A. No, he isn't.

Q. And you previously testified that Mr. Lerche made an estimate for the Umatic job in September 1953?

A. I think that was the date; I am not sure.

Q. You stated Mr. Fisher made a subsequent reestimate of that job and revised it upward?

A. Yes.

Q. How long after Mr. Lerche's estimate did Mr. Fisher make his estimate?

A. Oh, the day the bid was submitted or possibly the day before. As I remember the circumstances—I won't swear to my memory—I was estimating another job. Ordinarily I would do this job myself but I asked Mr. Lerche to do this job and usually an estimate isn't finished until the day before the bid is submitted. Mr. Fisher went over it and picked up some errors, enough errors to make me suspicious, so I went over it further. [97] He was only looking for one specific thing. When he found that, it seemed necessary to go into the whole thing.

Q. Was that the only job Mr. Lerche estimated for you?

(Testimony of James M. Morrison.)

A. No, he estimated many jobs. This was the biggest thing.

Q. Who else estimates jobs? A. I do.

Q. From the time you arrived here?

A. Yes.

Q. Who estimated jobs from September 29, 1952 until the time you took over in 1953? Would that have been Mr. Haley?

A. I am not too sure about things that happened prior to my time. I think Mr. Haley might have had a part in it. I think most were estimated by Honolulu.

Q. All right, some were estimated in Honolulu, some by Mr. Haley or Mr. Lerche?

A. None were estimated in Honolulu after I came.

Q. Did Mr. Fisher ever estimate any of these jobs? A. None on Guam.

Q. What about the major jobs like the TB wing at the hospital?

A. Those are my own estimates.

Q. What about the nursing home and housing at Guam Memorial?

A. Those are my own.

Q. On a dollar basis of the amount of business that the company estimated between the time you came here, March of '53 [98] and May of '54 would you say that you and Mr. Lerche each estimated about half?

A. Oh, no, because most of Mr. Lerche's were small jobs.

(Testimony of James M. Morrison.)

Q. Now you said Mr. Lerche made some obvious errors on the Umatic School job?

A. That is correct.

Q. Did I understand you to say that the Umatic School job broke even, lost money or made money?

A. The Umatic School job just about broke even.

Q. In other words, if the company lost better than \$200,000 in two years there was some estimating around here that was haywire besides Mr. Lerche's?

A. That is quite possible.

Q. In other words, this Umatic School job is not a glaring error in view of the overall operation of the company in Guam?

A. Yes, it is.

Q. Because somewhere the jobs didn't break even——

A. That is correct.

Q. And the major portion were jobs that Mr. Lerch didn't touch, isn't that correct?

A. That is correct.

Q. Is it correct that the company in the two years, '52 to '54, lost money?

A. I don't know the exact figures. I don't know the exact figures; it was 8 or \$90,000 in one year and \$45,000 in the [99] next. That, I might say, is what you would normally expect in moving into a strange territory. A great deal of the loss is due to becoming established.

Q. Were you in Fisher Construction Company in Honolulu prior to coming to Guam?

A. No, I had my own business there.

Q. Would you say that Fisher Construction

(Testimony of James M. Morrison.)

Company going into business in June of 1950 in Hawaii would have gone through the same growing pains that happened here?

A. Yes, almost any new company would have the same period.

Q. But they got over that before?

A. That is correct.

Q. Is the Company making money in Guam now?

A. We hope so.

Q. But you don't know?

A. No, frankly as of the moment until Mr. Warashima finishes the audit he is working on now. I don't know exactly where we stand. We are not growing phenomenally wealthy, but each year is showing an improvement.

Q. You think maybe this year you will break even? A. Yep.

Mr. Crain: I have no further questions, your Honor.

Mr. Turner: I have no further questions.

Examination by the Court

Q. I just have one question, Mr. Morrison, as regards your [100] inability to find Mr. Lerche on the job—did he have an office?

A. Oh, yes, he worked out of our office.

Q. And that office is located where?

A. In Tamuning.

Q. And you say that you had difficulty in finding him on the jobs? A. That is right.

Q. And what jobs were those?

(Testimony of James M. Morrison.)

A. At the particular time I am thinking about Mr. Lerche had three jobs under his jurisdiction, the Atkins-Kroll job, Cocos Island job, and Umatie School.

Q. And what explanation did he give you when you asked him where he had been?

A. Well, he was always at the other place. When I was at No. 1, he was always at No. 2, etc.

Q. Which was possible.

A. Possible, yes, but extremely unlikely.

Recross Examination

Q. (By Mr. Crain): Are the gross receipts taxes of the company paid current up to this time?

A. They are paid currently and have been.

Q. Are copies of gross receipts returns available?

A. Well, I presume the territory has them on file.

Q. Doesn't the company keep copies? [101]

A. Oh, yes, certainly we do.

Q. You heard the testimony of Mr. Warashima that for the year of '54 there was a reserve gross receipts tax of \$1,900 as against a gross income of \$304,000?

A. That reserve is a bookkeeping entry. It is set up out of each payment that comes in. Now actually we pay our gross receipts tax monthly, and there is no actual cash reserve for it. It is charged against each job when we receive payment.

(Testimony of James M. Morrison.)

Q. You don't carry it on your books as tax that has been paid? A. Oh, yes, certainly.

Q. Well, for the year ending May 31, 1954 you show taxes and licenses paid of \$1,941 against a gross income of \$304,000. That would not indicate a payment of gross receipts taxes?

A. There are several things that enter into that. No. 1, certain jobs are exempt from the payment.

Q. What jobs are those?

A. Any Navy work. The Navy refuses to pay taxes. No. 2, all of the money that we got, that we received as income from either of the joint ventures, we did not pay tax on. The tax was paid by the joint venture. We were simply being reimbursed for money we put out. That, I might say, was under a ruling from the Attorney General.

Q. How much did you have in the way of Navy jobs in '54?

The Court: I don't know that these questions are germane [102] to action No. 1.

Mr. Turner: Mr. Morrison just wanted it clear for the record they have been paying their tax.

Mr. Crain: Mr. Morrison brought it up they had paid them. I was told they hadn't.

The Court: The Government of Guam claims gross receipts taxes after 1953.

Mr. Turner: After one date when they changed the statute.

The Court: After July 1953 where the contract is with the government, it is on a cost-plus basis, why the government questions whether the gross

receipts are properly chargeable against the contracts—the gross receipts tax.

Mr. Crain: No, that is not my understanding. They have been paying gross receipts tax since 1950, the two major contractors on their cost-plus contracts.

A. By a very strange quirk the Air Force allows payment of taxes to the Government of Guam while the Navy does not, your Honor. All I wanted clear for the record was the fact we had paid our taxes.

The Court: That is very welcome news.

Mr. Turner: That is all taxes.

Mr. Crain: I am very glad you remembered that, Mr. Morrison.

Mr. Turner: I have a couple of intermediate witnesses, if you don't mind, who have been waiting for some time. I will call [103] them out of order. Mr. Bogovich.

PAUL BOGOVICH

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Turner): Please state your name and address for the record.

A. Paul Bogovich, Surf Club, Asan, Guam.

Q. Are you acquainted with Mr. Lerche who was formerly with Fisher Construction Company?

A. Yes.

Q. Did you ever have occasion to deliver Mr.

(Testimony of Paul Bogovich.)

Lerche any money or any materials or anything else?

A. The only money transaction between Mr. Lerche and Surf Club was aluminum windows which was purchased in San Diego, California, and they were delivered in Guam in Mr. Lerche's name, care of Fisher Construction.

Mr. Turner: That is all. If the court please, the pretrial order shows that Mr. Bogovich is going to testify that the plaintiff's reputation in the community was bad and that is all. You want to raise that objection?

Mr. Crain: Well, I think you are going a little beyond that.

Mr. Turner: I am calling him as a rebuttal witness to Mr. Lerche's testimony. [104]

Mr. Crain: I thought you were putting on your own case.

Mr. Turner: I am but I can bring out rebuttal testimony.

Q. (By Mr. Turner): How did the windows come to Guam?

A. The windows came into Guam at the Commercial Port and was picked up by Pacific Import and delivered to Surf Club.

Q. And when did that purchase take place?

A. To be truthful I can't tell you exactly the date at the present time. Mr. McDonald's got the invoice and papers and I couldn't find them so I can't recall.

Q. Do you remember what year it was?

(Testimony of Paul Bogovich.)

A. Last year.

Q. 1954? A. Yea.

Q. Do you remember whether it was the first half or last half?

A. It must have been the first half.

Q. When did you deliver the money to Mr. Lerche? How long before the windows came?

A. Well, the company would not have sent the windows out unless the money was sent to San Diego.

Q. Of your knowledge you gave the money to Mr. Lerche to pay for the windows?

A. Yes.

Q. Did he send the money on as you instructed him to? A. Yes. [105]

Q. And that was in the first half of 1954?

A. Yes.

Mr. Turner: That is all. Your witness.

Cross Examination

Q. (By Mr. Crain): Do you recall, Paul, whether you paid for that by check or cash?

A. That's something I can't exactly state now because Mr. McDonald, as I stated before, has the books and he is located in the neighborhood here but he is not in. I can't get hold of him. The transaction amounted to 900 some odd dollars, \$950. I received my merchandise; there is no question about that.

Q. You haven't been billed for it again?

A. No, I wasn't billed a second time, no.

(Testimony of Paul Bogovich.)

Q. Now at or about the time, Paul, this window order was made, wasn't Fisher Construction Company estimating or had made a tentative contract to do certain remodeling in the Surf Club?

A. Well, there was nothing on paper. There was some verbal talk with Mr. Lerche, not with Mr. Fisher. I didn't discuss anything with Mr. Fisher except that when the windows would arrive on Guam that Mr. Lerche would install them for me, of course. Mr. Lerche represented Mr. Fisher at that time.

Q. It was just a conversation?

A. Just a conversation; nothing in writing. In fact I never discussed it with Mr. Fisher. [106]

Q. Well, to your knowledge, Mr. Fisher was off the island when this work was going on at Surf Club, wasn't he?

A. Well, he was on the island when some of the work was going on at Surf Club, but I never went into details with Mr. Fisher.

Q. The company did work on the Surf Club after the 1953 typhoon, did they not?

A. Yes.

Q. Was some of that work for your insurance carrier and some for you?

A. Yea.

Q. It is a fact that Mr. Fisher and his organization are good customers at Surf Club?

A. Yes, they come down to Surf Club.

The Court: Do I understand, Mr. Bogovich, at

(Testimony of Paul Bogovich.)

the time you did say to him that Mr. Lerche would put them in after they got there?

A. Yes, there was a tentative talk in that respect.

Mr. Turner: Just one question.

Redirect Examination

Q. (By Mr. Turner): Hadn't Mr. Fisher told you he wouldn't invest any more money in that building or do any work for you?

A. That is correct.

Q. Was that prior to the work that was done?

A. Well, Mr. Fisher made a statement to me that he preferred I build a new building rather than remodel the Surf Club.

Q. You don't recall whether it was at the time of this work or afterwards?

A. That I can't recall whether it was at that time or after that.

The Court: Thank you, Mr. Bogovich.

CARLINA ROSARIO

was called as a witness by the defendant, was duly sworn and testified as follows:

The Court: Who is this witness?

Mr. Turner: This is Mrs. Rosario, your Honor.

The Court: Now just sit down a moment, Mrs. Rosario. What bearing does her testimony have upon the question of Mr. Lerche's standing in the community?

Mr. Turner: Well, I wasn't calling her for that

(Testimony of Carlina Rosario.)

purpose, your Honor. I was calling her as rebuttal to his direct examination.

The Court: Mr. Turner, you haven't even brought out yet there was any communication to Mr. Morrison or to the Fisher Construction Company, any complaint or anything else that Mr. Lerche was not paying his bills.

Mr. Turner: I intend to.

The Court: Mr. Morrison said the reason he discharged him was because he wasn't making money for the company. [108]

Mr. Turner: I intended—I am calling these people because they have been sitting out there all day. I am calling them out of order. I appreciate your point. It is just rebuttal on his testimony this morning.

The Court: Of course, you brought out on cross-examination so far as Mrs. Rosario was concerned there was a dispute over the lease and he hadn't paid up on his lease and that now everything was harmonious.

Mr. Turner: I appreciate that, your Honor.

The Court: My point is that I don't see having a dispute over a lease on Guam necessarily reflects on one's credit standing in the community.

Mr. Turner: No, he said he paid his rent up until the time this dispute arose and this is rebuttal testimony. I am offering to impeach his testimony.

The Court: What bearing does it have unless Mrs. Rosario saw fit to communicate with the Fish-

(Testimony of Carlina Rosario.)

er's and ask him to pay his rent or something of that kind.

Mr. Turner: Merely to impeach his testimony, your Honor.

The Court: Well, if you want the testimony in the record, I certainly can't prevent it but Mrs. Rosario has indicated she doesn't understand the language.

Mr. Turner: Well, I will excuse her if you don't think it has any merit, your Honor.

The Court: Well, I am not trying your case and I certainly [109] can't deny you the right to put on your case any way that you see fit unless objected to by the other side, but I am somewhat familiar with that dispute since I tried the action in this court, and the dispute started with one of the most ambiguous lease agreements that I have seen in some time, and finally it was resolved by a free and frank admission on Mr. Lerche's part that he owed the rent up until that time.

Mr. Turner: I won't bother questioning her, your Honor.

The Court: And the parties stipulated in open court that he owed the rent all up until the time of renewal.

Mr. Turner: All right, your Honor, I won't call her as a witness.

The Court: Yes, I don't think it will be helpful to us here. You may be excused.

PAUL BITTING

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Turner): Please state your name and place of residence.

A. Paul Bitting, Tamuning, Guam.

Q. By whom are you employed?

A. By Fisher Construction.

Q. In what capacity are you employed?

A. Master mechanic. [110]

Q. How long have you been an employee of Fisher Construction in Guam?

A. In Guam about a year and six months.

Q. When did you first come to work?

A. It was October 23, 1953.

Q. What has been your job assignment as a master mechanic with Fisher?

A. I take care and charge of all the equipment, the operator's materials that is used on the jobs, charging them out and receiving them back from the jobs on completion.

Q. Did you ever have any other position with the company or any other assignment with the company here on Guam?

A. Well, now I am doing some outside work, some pipeline work for them.

Q. Did you ever have any connection with the material warehouse, issuing materials?

A. Yes, sir.

Q. What was that job?

(Testimony of Paul Bitting.)

A. Issuing out all tools, lumber, cement and whatever was pertinent to the construction.

Q. Do you know Mr. C. W. Lerche?

A. Yes, sir.

Q. Did you have occasion to observe Mr. Lerche on the Umatic School job at any time?

A. Yes, sir. [111]

Q. Would you state the circumstances under which you observed him on the Umatic School job?

A. Well, once I observed Mr. Lerche sitting in an automobile with four men from BPM. They were at that time consuming beer.

Q. This was during the——

A. During the process of the job while they were pouring concrete.

Q. Where did you observe Mr. Lerche?

A. Down on the main road in Umatic.

Q. In the vicinity of the job?

A. The job was up on the hill, I imagine about a hundred yards distant.

Q. Now in connection with being in charge of heavy equipment for the company did you, after February, 1954, have any occasion to object to Mr. Lerche in connection with the equipment utilized by him?

A. Yes, I questioned him on the issuance and use of equipment.

Q. Will you please explain the question that was raised.

A. Rephrase that and ask that again.

(Testimony of Paul Bitting.)

Q. Did you have occasion to object to the manner in which any equipment was handled under Mr. Lerche's control?

A. No, because the operators were actually working for me.

Q. Did you have any occasion to object to Mr. Lerche's performance after February 1, 1954 when you were in charge of [112] the materials warehouse?

A. Yes, the question was brought up quite a few times when the jobs he had were completed that no material was ever returned, and it seemed that every other job has material returned to the warehouse and they would be issued a slip on what they had returned.

Q. Did you make these objections known to either Mr. Morrison or Mr. Fisher?

A. I told Mr. Fisher this.

Mr. Turner: That is all the questions I have.

Cross Examination

Q. (By Mr. Crain): You say that was after February 1, 1954?

A. Yes, sir.

Q. How many jobs were involved?

A. Well, when I arrived here he was working on Atkins-Kroll.

Q. We are talking about after February 1, '54.

A. The Umatic job was the last job that I remember him on.

Q. Isn't it a fact that he wasn't on the Umatic job at its completion?

(Testimony of Paul Bitting.)

A. That is right.

Q. Then he wouldn't have had anything to do with materials coming back from the job after it was over, would he?

A. Material was taken out a couple of times that were not [113] required for the job.

Q. That wasn't what you testified to on direct. You indicated he did not return materials from the job, excess materials? A. That is right.

Q. I ask you after February 1st when you took over the warehouse name the jobs he didn't return the materials from? The only one you named is Umatic School and he wasn't—it wasn't completed when he left the company.

A. The Atkins-Kroll job has passed my mind. It would be Atkins-Kroll job and Bilmar Market job.

Q. You say no material came back from either of those jobs? A. That is right.

Q. What material should have come back?

A. Well, every job has material that is returned, such as plywood, two by four's. If they used roofing they never take out the correct sheets. Everybody else brings back partial pieces or whole pieces.

Q. When was the Atkins-Kroll job completed?

A. I couldn't give you a correct date on it.

Q. But you remember no material came back?

A. That is right.

Q. When was the Bilmar Market job completed?

A. I don't know the dates.

Q. How much material went out of the warehouse for the [114] Atkins-Kroll job?

(Testimony of Paul Bitting.)

A. I would have to consult the tickets.

Q. Did the material for this particular job all go out at one time? A. No, sir.

Q. It went over a long period of time in small amounts? A. That is right.

Q. What, specifically, do you feel was not returned to the warehouse?

A. Well, there is no item specifically but there should have been some lumber that was used for form lumber, for sheet roofing, nails.

Q. I believe you testified you didn't tell Mr. Morrison but you went directly to Mr. Fisher with it? A. That is right.

Q. Was Mr. Fisher here at the completion of both those jobs? A. I don't remember.

Q. But you by-passed Mr. Morrison completely, is that right? A. Yes, sir.

Q. And Mr. Lerche would not have been involved in a failure to return material from the Umatic School job, is that right?

A. Well, he did not complete the job.

Q. That answers the question, doesn't it? You are still an employee of Fisher Construction Company, is that right? [115] A. That is right.

Mr. Crain: I have no other questions.

The Court: You may be excused. The court will take a ten-minute recess.

(The court recessed at 2:55 p.m. and reconvened at 3:10 p.m., April 11, 1955.)

The Court: Call your next witness.

Mr. Turner: Mr. Fisher will be the next witness.

A. M. FISHER

called as a witness by the defendant, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Turner): Please state your name and address for the record.

A. A. M. Fisher.

Q. Address?

A. I don't know whether it's Tamuning, Guam, or Honolulu, Hawaii—both places.

Q. Do you have any connection with Fisher Construction Company, Ltd.?

A. Yes, I am president and general manager.

Q. And have you had those positions since the company was first organized? A. Yes.

Q. Have you had those positions since the company was first [116] organized?

A. That is correct.

Q. When was the company first organized?

A. About May 1, 1950.

Q. There has been introduced by stipulation as an exhibit an agreement dated September 29, 1952 between Mr. Lerche and your company. Would you look at that and say whether that constitutes the agreement and whether you signed it?

A. Yes.

Q. You actually hired Mr. Lerche then?

A. That is right.

Q. The agreement states that he will be employed in the capacity of administrator. Will you please state what that capacity was?

(Testimony of A. M. Fisher.)

A. Office manager.

Q. As office manager what were Mr. Lerche's duties?

A. Well, primarily to see that statements got out, to see that the books were in some sort of readable and understandable condition and to see that the Honolulu office got the information necessary to understand what was going on on Guam.

Q. Now when Mr. Lerche was first employed who was he under? A. He was under Haley.

Q. What was Haley at that time?

A. Haley was Guam manager.

Q. And was Mr. Haley replaced at a subsequent date? [117]

A. Replaced by Mr. Morrison.

Q. When did that replacement take place?

A. About March of 1953.

Q. Now after March of 1953 was Mr. Lerche under any particular individual here on Guam?

A. He was under Mr. Morrison.

Q. Did you discharge Mr. Lerche?

A. Yes.

Q. Referring to after February 1, 1954 will you state what happened to cause you to discharge Mr. Lerche?

A. May I be permitted to go back of February 1 a month or two?

Q. You may if it bears on your decision of February 1, 1954 to discharge Mr. Lerche.

A. Well, I had been horribly disappointed in Mr. Lerche and then he seemed to have an upsurge

(Testimony of A. M. Fisher.)

after the 1st. I was able to find him when I wanted him, which I had never been able to do before, so I thought I would keep him and give him the courage and ambition to keep going so I gave him a raise, but it wasn't three or four weeks until deficiencies showed up more than there was before.

Q. What were they?

A. No. 1, he wasn't on the job; No. 2, on the Cocos Island job he had distinct orders, verbally, under no circumstances was he to start until the material was here. None of it was to [118] be bought locally. Then we found that Umatic School—his take-off was faulty. He had prices in there that didn't begin to cover the stuff that was supposed to be covered and we were faced with the necessity of fighting to keep from losing money. Those things don't show up until you actually get going. We found out on little jobs like the Bilmar job we lost \$1,100 worth. It doesn't seem possible you would lose. I said under no circumstances would we do any work on Mr. Bogovich's building, and when Lerche bought the window sash for him he did it contrary to my orders, and we either have an organization and a head to it or we don't run it.

Q. In regards to Cocos Island job was Mr. Lerche in charge of assembling material for that job?

A. Yes, he had three months time in which to assemble it.

Q. What were the shortages?

A. The main one was a valve which he over-

(Testimony of A. M. Fisher.)

looked completely and it cost us \$150 by air to get it here.

Q. That was exclusive of the cost of the valve?

A. Yes, may I explain—the Cocos Island job we tried to work it in with the Umatic School job. It was worked in with the TB wing because of equipment so we don't run into the Umatic job and because this little item over here was neglected, instead of doing the job in a week the equipment and men had to remain there longer and the superintendent at Umatic School was kept on there two and a half weeks longer. [119]

Q. That was Cocos Island?

A. Which in turn reflected back on Umatic School which in turn reflected back on the TB wing.

Q. Now with reference to Umatic School could you specify some of the shortages?

A. No. 1, door astragals which fit between two doors. Those are quarter-inch steel. There are a certain number of doors. All you have to do is count the number of doors and put down the number of astragals required. We found he had less than half enough. Those things had to be ordered from Honolulu and shipped air express and inasmuch as they weighed 7 pounds per lineal foot, it was very very expensive.

Q. Now Mr. Lerche estimated the Umatic School job. You went over it and Mr. Morrison subsequently went over it. Would those errors that Mr. Lerche made normally be caught in subsequent checks?

(Testimony of A. M. Fisher.)

A. I caught them in about five minutes.

Q. All of the errors?

A. Mr. Morrison and I were pretty busy. We were supposed to hand in the Umatic estimate the following day. I took a fast look and I uncovered so many errors I turned around to Mr. Morrison and said "You'd better give this a good look." Prices for labor and concrete—how much form work is there—when you have been in the game a long time you get those answers very quickly—how much equipment in that entire job. He had [120] rental on one compressor, two months, and all the equipment we needed was crane, front end loading, two 4½-yard mixers and an extra truck, man-haul truck, and the total amount of equipment he had in there was \$500.

Q. How much equipment was required?

A. Well, I think our rental plus fuel and oil probably ran to about 16 or \$17,000 for that job.

Q. You don't feel that all of those errors he made could have been caught?

A. Well, most of them could have been caught. For instance, on the hardware we didn't have time overnight to go out and get a new price and he didn't check to see whether he had all the hardware or not. Actually, on the bid he had 41 or \$4200 and that didn't include all the hardware.

Q. Do you remember how much the hardware was? A. \$7,200.

Q. And your estimate called for \$4,200?

(Testimony of A. M. Fisher.)

A. That is right, he left out half of the ornamental iron work.

Q. Now with reference to Thomas Curran do you remember whether the company did that job?

A. Yes.

Q. Did you, after February 1, have brought to your attention any errors in that job?

A. On that job a certain amount was paid in cash and [121] the balance to be paid at the rate of \$50 per month. I came over at one time and was looking at the accounts receivable and found they had paid nothing for about eight months so I wrote Mr. Curran a letter. First I checked with Mr. Morrison to find out if everything was OK and I was told everything was. I got a letter in response which brought me up to their house and I was horribly ashamed of what I saw.

Q. Could you tell us what you saw?

A. Would you like to have me read this? That is the letter I got back after I wrote them. I think it's dated March 24.

Mr. Turner: Do you have any objection?

Mr. Crain: No.

Mr. Turner: Your Honor, may this be admitted as Defendant's Exhibit 1, the first one.

The Court: Exhibit A.

(Testimony of A. M. Fisher.)

DEFENDANT'S EXHIBIT A

Mr. A. M. Fisher Agana, Guam, March 16, 1954
Fisher Construction Co., Ltd.
P.O. Box 309, Agana, Guam.

Dear Mr. Fisher:

I am in receipt of your letter dated March 12, 1954. I am happy to have this communication from you, for I feel that at long last justice will be done my claim.

About the middle of last year, I wrote c/o Mr. Morrison, and brought to his attention the unfinished work on my house. This missive was the outgrowth of many fruitless months, during which time every effort was made by me to have the work finished on my house. Realizing that it was a hopeless situation, I then wrote to Mr. Morrison and informed him that unless the work was finished no more payments would be forth coming. Shortly after, I had a personal conversation with Mr. Morrison, and he assured me that the matter would be taken care of. I am still waiting. And so your letter. I can well appreciate your position, as it does appear as if I am "taking unfair advantage" of your kindness in granting me this consideration.

To be specific: The levers in the bathroom were installed, however, the wood frames have never been painted. Due to a mistake, the casing around the door had to be removed, after the paint was applied. The casing was refitted, and never retouched. As a

(Testimony of A. M. Fisher.)

result it was left dirty, and the putty fully exposed, in all creating an unpleasant appearance.

The front porch, where it was joined to the original house, has a severe leak. Also the porch that runs the full length of the house is in and has been in poor condition. The 1x6 lumber used for siding is one mass of jagged cracks. The putty has cracked and in all it is most unsightly. It does not speak well for your Company when visitors ask who did the work.

The back porch, also has a bad leak. On the outside the gutters were never finished, and over the front entrance there is a bad leak. Also the down spout has fallen down.

The quality of the workmanship in general is poor, considering that a large and reputed firm construction was responsible. I just do not to tell people who worked on my house.

I would sincerely appreciate if you would personally inspect this work, for thus we can come to an amicable understanding.

Very truly yours,

/s/ Thomas Henry Curran

Mr. Turner: Yes.

Q. (By Mr. Turner): Now you say you received that letter in March?

A. That is right.

Q. About the 24th. Did you call upon Mr. Curran then?

(Testimony of A. M. Fisher.)

A. I called on Lerche first and he said it was all finished.

Q. Now this was in March 1954?

A. That is right. [122]

Q. When you had this conversation with Mr. Lerche? A. That is right.

Q. Did you thereafter look at this residence?

A. Went up the same day I got the letter and found that everything he had in that letter was true.

Q. Do you remember specifically what work had not been accomplished?

A. Well, none of the molding or baseboard in the new room, the gutter and down spouts were not in, the entrance hallway was not complete, and I would say that the job probably in its total was only 75 percent complete that we were supposed to have done.

Q. Do you remember the total amount of that job? A. I think about \$3,500.

Q. Did the company do another job for Atkins-Kroll, Guam, Ltd.? A. Yes.

Q. What was that job?

A. We converted a shop building into a store building or warehouse, rather, a warehouse building into a storeroom and office.

Q. Do you remember the period over which the work was done?

A. Well, it was done in the fall of '53. Presumably it was finished about the first of the year, '54.

Q. Did you after February 1, 1954 have your attention called to that particular job? [123]

(Testimony of A. M. Fisher.)

A. In two ways, one was that I wanted to know why we couldn't square our account with Atkins-Kroll for the building. No. 2, the then manager, Jim Van Sickland, called me up and asked me why we couldn't finish the job, why we couldn't correct the conditions there.

Q. Was the job completed?

A. It wasn't completed satisfactorily. I wouldn't have paid it in their place.

Q. Do you remember what wasn't completed?

A. Well, one thing, defects in the beams over the entrance. Some of the plywood had never been securely nailed. As far as I am concerned it was strictly a hash job.

Q. After you had this conversation with Mr. Van Sickland did you discuss the job with Mr. Lerche?

A. Yes, we got all business.

Q. What do you mean?

A. Well, they had taken out one post. In view of the fact we had designed the job then it was up to us to strengthen the beams to take care of the absence of one post. Mr. Lerche designed the job himself.

Q. Did you have to complete the job?

A. Oh, yes, we completed the job. The client was entitled to it.

Q. Did the company sustain any additional expense by having to move back in to complete the job? [124]

A. You always do when you move back.

Q. Did you have any other aspects of Mr.

(Testimony of A. M. Fisher.)

Lerche's work after February 1, 1954 which dissatisfied you?

A. I couldn't find anything which satisfied me because all these things kept piling up at one time—things that had been hidden from me.

Q. Why did you discharge Mr. Lerche?

A. Because the sum total of what he did indicated that there wasn't any sense in hanging on to him any longer. We couldn't build him up.

Q. Did you personally give Mr. Lerche notice of his discharge? A. Yes.

Q. Did Mr. Lerche after May 24, 1954 make any claims against the company for salary?

A. No.

Q. No claims? A. Until the suit.

Q. At the time Mr. Lerche was discharged did he make any claim or contention that he was entitled to salary? A. No.

Mr. Turner: Your witness.

Cross Examination

Q. (By Mr. Crain): When did your company take the contract on the Curran house? [125]

A. '52, I believe.

Q. When was the job supposed to have been completed?

A. Oh, I would say by the first of the year '53 or before.

Q. I believe you said it was a \$3,500 job. It wouldn't take long, would it?

A. No.

(Testimony of A. M. Fisher.)

Q. Did Mr. Lerche have charge of that job?

A. He had charge of all small jobs. He had charge of all jobs at that time except Adelupe School.

Q. When did he have charge of small jobs?

A. When we found out after about 90 days that he wasn't any use in the office. It was turned over to him. Mr. Jules started it and it was turned over to him by myself.

Q. About what time?

A. I would say somewhere around October or November.

Q. But you just said he spent 90 days in the office?

A. That is right, most of 90 days in the office.

Q. That would have been until the first of January.

A. We will vary that a little.

Q. The letter that has been introduced in evidence here spoke of many complaints being made by Mr. Curran to Mr. Morrison. The letter didn't mention Mr. Lerche.

A. Well, Mr. Morrison could only go to Lerche for his information.

Q. Isn't it strange when Mr. Morrison was on the witness [126] stand he couldn't testify concerning this Curran job?

A. I don't think he was asked about the Curran job. As I remember his testimony, he wasn't asked about the Curran job.

Q. That is your answer to that question?

(Testimony of A. M. Fisher.)

A. At least if he did I didn't hear it so I assume he wasn't asked.

Q. If he stated during his testimony that he didn't know anything about the Curran job, he would be in error in view of the fact he had been approached many times, is that right?

A. Yes, if, when and how.

Q. And I believe you testified Mr. Lerche was under your man, Mr. Tom Haley, until Haley was replaced by Morrison? A. That is right.

Q. Haley remained on your payroll some time after that, did he not?

A. I would say about six months.

Q. He was discharged?

A. That is right.

Q. Why was he discharged?

A. Well, he was an alcoholic, I would say.

Q. During the additional six months he stayed on after Mr. Morrison arrived here what were Haley's duties with the company?

A. He was field superintendent.

Q. Was Mr. Lerche working under him at that time? [127]

A. No, sir, not at that time; they were both field superintendents.

Q. So from March '53 until the date of his discharge Mr. Lerche was under the personal supervision of Mr. Morrison, is that right?

A. That is right.

Q. And yourself when you were here?

A. That is right.

(Testimony of A. M. Fisher.)

Q. Can you tell us approximately how many times you were in Guam from September of '52 until May of '54? A. About fifteen.

Q. On an average how long would you stay here when you came to the island?

A. Anywhere from ten days to six weeks.

Q. And you have testified to bad experiences with Mr. Lerche on the Umatic School job, Cocos Island job, Atkins-Kroll and Curran jobs?

A. That is right.

Q. Do those represent the jobs you found fault with?

A. Not all of them. I found fault with other jobs too.

Q. I believe there was previous testimony that you probably broke even on Umatic School?

A. I think so, yes.

Q. How about Cocos Island job?

A. We made a little money on that. [128]

Q. How about Atkins-Kroll?

A. We made a little money on that.

Q. Now getting back to the Atkins-Kroll job in a little more detail. There has been some testimony here that no material was returned from that job. The testimony was that sheets of plywood and such should have been returned.

A. Construction material.

Q. Isn't it a fact that Atkins-Kroll furnished the siding and roofing for this job?

A. Not that job.

Q. The siding and roofing?

(Testimony of A. M. Fisher.)

A. Not that job they didn't furnish the sheet metal.

Q. The roofing? A. Probably the flooring.

Q. How much flooring would go on a job like that?

A. I don't recall right now; I would say probably 150 lineal feet.

Q. Normally wouldn't the person who estimated that job be able to pretty accurately determine how much would be needed?

A. No, you order ten percent more.

Q. But theoretically the ten percent could be used?

A. If it were used very often you would be out of business.

Q. You testified you probably made a little money on the Atkins-Kroll job, probably made a little money on the Cocos Island job and probably broke even on Umatic School; still for [129] the two years during which Mr. Lerche was working you show a loss.

A. All that time Mr. Lerche was spending money, his salary was going on and you have shop overhead and camp overhead. I don't think what we gained amounted to \$5,000.

Q. That he made for you?

A. That he made but that was net.

Q. Well, now was Mr. Haley estimating jobs for the company out here?

A. No, he didn't; he never did. He estimated one job; that was the Santa Rita power job.

(Testimony of A. M. Fisher.)

Q. Did you make money or lose money on that?

A. We lost money.

Q. Is it correct that Honolulu estimated most of the jobs?

A. They estimated all of the pipeline jobs and until Mr. Morrison came here the larger building jobs.

Q. When you say Honolulu did the estimating, who actually did the estimating in Honolulu?

A. Tom Juile, vice president.

Q. And when Mr. Morrison got here he estimated most of the jobs?

A. Mr. Morrison also estimated jobs before that on a fee basis.

Q. Well, somewhere along the line someone estimated you out of \$200,000? [130]

A. Yes, sir.

Q. And it wasn't Mr. Lerche?

A. You can spend \$100,000 like that——

Q. The jobs you complain about are the jobs you made money on.

A. When you say you make money or lose money let's get down to brass tacks. I am talking about a gross profit on a job. When we figure overhead and everything else in there that job presumably made money or didn't make money in the overall operation.

Q. But in the overall operation somebody lost \$200,000? A. That is probably true.

Q. And I don't believe you can attribute it to Mr. Lerche?

(Testimony of A. M. Fisher.)

A. I attribute it, a great deal of it, to Mr. Lerche's inability to stay put or do the job he was supposed to.

Q. This staying put is regardless of having widely scattered jobs in widely scattered places and not being the same place where Mr. Morrison was?

A. Widely scattered? I am not questioning you. You are questioning me. After Mr. Morrison got here he was a field superintendent but as field superintendent he was tremendously expensive and nobody could find him.

Q. Do you feel that Mr. Lerche was the man who lost you the \$200,000?

A. No, he lost his share. [131]

Q. The jobs he estimated didn't lose money.

A. Those weren't the only jobs he ran.

Q. I am mentioning the only jobs you people have mentioned here today.

A. Bilmar—he lost money on that.

Q. The whole contract was only \$1,100.

A. We were hooked with overhead and everything else to about \$500 on that.

Q. Did he lose money for you on the Air Force jobs?

A. He had nothing to do with the Air Force jobs except supply and we made money on the Air Force jobs in spite of Mr. Lerche, not because of Mr. Lerche.

Q. What jobs did you lose money on?

A. We lost money on Adelupe School. We lost money on the Santa Rita job; we lost money on

(Testimony of A. M. Fisher.)

general overhead where we had nothing but overhead. The presumption that we would discharge a man who was making money for us is pretty far-fetched. We are always looking for men who will make money for us.

Q. Isn't it a fact that, Mr. Fisher, that you didn't consider Mr. Lerche a satisfactory employee from the day you hired him? A. Almost.

Q. Isn't it a fact that you sent Dieckman out here to fire him?

A. No, I sent Morrison. I said, "As soon as you can get [132] rid of Haley and Lerche, do so."

Q. And that was March of '53?

A. March. Morrison felt he could save them both and I sent Dieckman out. Dieckman was just as bad a choice—to take Lerche's place.

Q. Dieckman came in September or October '53?

A. Somewhere along there.

Q. And somewhere around March of '54 Mr. Lerche was given a raise?

A. As soon as I got rid of Dieckman, Lerche seemed to improve.

Q. You got rid of him that fast?

A. Yes.

Q. He only worked about three or four months?

A. Just about.

The Court: I am not entirely clear, Mr. Fisher, as to your testimony on Umatic School. Mr. Morrison's testimony was that you were \$5,000 under the next lowest bid. A. That is right.

(Testimony of A. M. Fisher.)

The Court: Well, you only get jobs when you are the lowest bidder, don't you? A. That is right.

The Court: Do I understand from that then, according to your best judgment, that the next lowest bidder was \$15,000 under cost?

A. Well, your assumption is that you make ten percent on these jobs; you don't.

The Court: No, I based that on the fact you said you lost because of Mr. Lerche's failure to properly estimate and so forth—that you lost \$15,000 or \$20,000.

A. No, we didn't on that job. Had it been estimated correctly we would never had the job. We would have been either second or third high.

The Court: So that that \$5,000, as I say, that would indicate that the next lowest bidder hadn't sharpened his pencil enough either.

A. He had sharpened it too much, just as we had. Of course, that goes back to the old statement, your Honor: No contractor dies leaving money unless he dies prematurely.

The Court: Now Mr. Lerche said on the 24th of May you fired him and just paid him through that day?

A. I don't remember that, your Honor. It is just barely possible, but I couldn't answer that correctly unless I went back to the books and looked.

The Court: And nothing happened on the 24th of May or two or three days preceding it but on the 24th of May, because of an accumulation of errors, you decided that you would just get rid of Lerche?

(Testimony of A. M. Fisher.)

A. Well, I think the final straw was the valve coming in from Honolulu for this job with about \$150 air express charge on [134] it when Lerche previously told me he had everything ready to go.

The Court: Then the straw that broke the Fisher's back was the valve, the \$150 valve?

A. That is right, however, there was plenty of trouble accumulated before that. It wasn't just one valve for \$150. It was all of his errors that started coming to my attention and the inability to find Mr. Lerche when he was needed had a great deal to do with it, too.

The Court: Did you find out where he was?

A. No, that was one nice thing about Lerche—you could never find him.

The Court: Did he give you an explanation as to where he was?

A. Oh, yes, we got lots of explanations. Those were always back-explained. He wouldn't tell you where he was going to be beforehand.

The Court: Now on these jobs, other than Mr. Lerche, you had job foremen, didn't you?

A. Yes.

The Court: And couldn't those supervisors tell you what time Mr. Lerche had spent on the job at any given time?

A. That is right; those were questions that were answered, too.

The Court: Then you must have known he was on the job or driving between the jobs? [135]

(Testimony of A. M. Fisher.)

A. That is right and my determination was that he wasn't on the job.

The Court: When you confronted Mr. Lerche with that information what was his explanation?

A. There was always some alibi—he had to stop here and there or see some inspector or something of the sort. As a matter of fact, he would stop in the office to find out what the old man's disposition was and if he found I was pounding the pavement, he wouldn't bother to come in the office. It is easy to laugh about but it was my dollars that were involved.

The Court: My problem in this case is in determining why you continued to employ a man and increase his salary from the 29th of September 1952 until May 24, 1954 if he had all of the bad qualities that you describe. You are an efficient operator. You certainly know whether a man is lacking in those qualities that you thought you were buying.

A. When I sent Morrison out here in March of 1953 he was told to fire Lerche and Haley. Morrison wrote and said he thought he might be able to save them after all. When you give a man authority you give him discretion with it. Then I came out here and Morrison was busy with the hospital job. I sent Dieckman up here with instructions to fire Lerche as soon as Dieckman proved out. When he did not perform here I fired Dieckman and Lerche seemed to snap out of it. We thought he could turn into a good man. Basically he has got the ability

(Testimony of A. M. Fisher.)

[136] but something had gone haywire. I thought he had improved but the improvement was all imaginary, your Honor.

Mr. Crain: May I ask Mr. Lerche a question?

The Court: Oh, yes.

Cross Examination

Q. (By Mr. Crain): You stated you had foremen on the job who reported to you on Mr. Lerche's lack of appearance?

A. Only when we asked.

Q. They didn't make any general statement that Lerche was not on the job?

A. Not until asked.

Q. Then did they give you a sweeping statement?

A. No, they said he was on the job around 7:30 in the morning. They had asked him to bring some stuff out and they hadn't seen him since then.

Q. Who were they?

A. Well, one was a man by the name of Samma.

Q. Is he still here?

A. Yes—Oki, who is not on the island and a fellow by the name of Husman who is on the island.

Q. Is that about it?

A. No, one by the name of Frank Cortez who is not on the island.

Mr. Crain: All right, thank you. [137]

Mr. Turner: The defendant rests, your Honor.

The Court: Rebuttal?

Mr. Crain: Mr. Dieckman.

HAROLD DIECKMAN

called as a rebuttal witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Crain): State your full name please.

A. Harold Dieckman.

Q. Where do you live? A. Tamuning.

Q. By whom are you employed now?

A. Cyntor Construction.

Q. Were you ever employed by Fisher Construction Company? A. Yes, sir.

Q. Where were you hired by that company?

A. In Honolulu.

Q. Were you employed at the time you were approached by Fisher Construction Company and offered a job? A. Repeat the question.

Q. Were you employed in Hawaii at the time that you were approached by Fisher Construction Company and offered a job? A. Yes.

Q. Who did you work for? [138]

A. The Territory of Hawaii.

Q. What was your job?

A. Superintendent of prison maintenance.

Q. When did you come to Guam for Fisher Construction Company?

A. August 19, 1953.

Q. What was your position to be in Guam?

A. Assistant manager of Guam-Pacific operations.

Q. You came to Guam and entered upon the

(Testimony of Harold Dieckman.)

performance of your duties in that job, is that right? A. Yes, sir.

Q. When did you leave the employ of Fisher Construction Company? A. April 1954.

Q. Did you know Mr. C. W. Lerche during the time you were employed by Fisher?

A. Yes, sir.

Q. In the course of your employment did you observe him on or about the various jobs that he was employed on? A. Yes.

Q. Did you find him to be a person reasonably experienced in the work that he was doing?

A. Yes.

Q. What would you say as to the workmanlike manner in which he performed his work for Fisher Construction Company? [139]

A. I would say it was above average.

Q. And you were able to observe him in his work up until the time that you left the company yourself, is that right?

A. I wasn't in a position to observe his operation in the latter half of my stay with Fisher.

Q. What was the reason for that?

A. Well, I was confined to work on the Guam Memorial Hospital. His work took him different parts of Guam.

Q. So it was just during the first half of your tour of duty on Guam with Fisher that you were able to observe him? A. Yes.

(Testimony of Harold Dieckman.)

Cross Examination

Q. (By Mr. Turner): Were you discharged by Fisher Construction Company?

A. Yes, sir.

Mr. Turner: That is all the questions I have.

Examination by the Court

Q. What was your salary with Fisher?

A. \$250 a week.

The Court: No other questions. Thank you.

Mr. Crain: Mr. Poole.

FREDERICK M. POOLE

called as a rebuttal witness by the plaintiff, was duly sworn and testified as follows: [140]

Direct Examination

Q. (By Mr. Crain): Please state your name.

A. Frederick M. Poole.

Q. Where do you live?

A. Government of Guam quarters 1025, Mangilao.

Q. Are you an employee of the Government of Guam? A. I am.

Q. What is your job?

A. I am head of the Engineering Division, Department of Public Works.

Q. How long have you been in that job, Mr. Poole? A. Two years.

Q. When did you come to Guam?

A. 9th of March 1953.

(Testimony of Frederick M. Poole.)

Q. In the course of your job have you had occasion to do business with Mr. C. W. Lerche?

A. Yes, I have.

Q. Was that primarily during the time that he was in the employ of Fisher Construction Company?

A. It was.

Q. On what particular jobs did you have cognizance of his work or do business with him?

A. On the Umatic School job.

Q. What were your duties on the Umatic School job?

A. Well, as part of my duties I have charge of contract [141] administration so I was administering the Fisher contract for Umatic School.

Q. Did that mean you spent a considerable amount of time at the jobsite?

A. Very little.

Q. Where did you do your contract administering?

A. Mostly out of the office. We have an engineer inspector.

Q. Did Mr. Lerche have occasion to come to your office then concerning the operation of Umatic School job?

A. He did on various phases of it.

Q. And did you also receive reports from the inspectors who were on the job itself?

A. I did.

Q. Did you ever receive any complaints as to the caliber of Mr. Lerche's work?

A. No, we didn't.

(Testimony of Frederick M. Poole.)

Q. Did you find him to be reasonably efficient on the job?

A. I would say we had no complaints on the job at all during the time. The progress was satisfactory.

Q. Did you find Mr. Lerche to be cooperative?

A. Quite.

Q. Did he appear to be looking out for the business interests of Fisher Construction Company?

A. I think that he was very much. [142]

Cross Examination

Q. (By Mr. Turner): Your only contact with Mr. Lerche was at the office of Public Works, wasn't it?

A. Yes, with the exception of a few times I made occasional trips to Umatic.

Q. And what type of contact would you have with Mr. Lerche up at the office?

A. Well, it was usually a question of interpretation of plans and specifications or sudden changes.

Q. And very little in the field?

A. Very little in the field—just going down and inspecting the job.

Q. You didn't necessarily go with Mr. Lerche all the time down to inspect the job, did you?

A. I don't believe I ever went with him to inspect the job.

Q. When you went down to look at the job didn't you deal with the superintendent actually in charge of the job?

(Testimony of Frederick M. Poole.)

A. Most of the time; occasionally we would find Mr. Lerche down there.

Mr. Turner: That is all.

Examination by the Court

Q. Mr. Poole, do you recall the Umatic School contract? A. I do, yes, sir. [143]

Q. Did you help make the estimates as to the approximate cost of that job?

A. No, sir, I did not. I did not get into that job until December of 1953 and the estimates had all been made and the contract had been let before I took over that office.

Q. You have no way of knowing then whether the lowest bid corresponded with your estimates?

A. No, I don't without looking it up in the file.

The Court: Thank you very much, Mr. Poole. You may be excused.

Mr. Crain: That is all, your Honor, except I want to refute—I would like to put Mr. Lerche on for a few questions if the court please.

The Court: Very well.

C. W. LERCHE

previously called as a witness in his own behalf, was recalled in rebuttal in his own behalf and having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Crain): The witness is reminded that he has already been sworn. Mr. Lerche, you

(Testimony of C. W. Lerche.)

have heard the testimony here of various people that you were derelict in your duty in several ways in your employment with Fisher Construction Company. One item that was specifically mentioned was that you did not return material from [144] jobs then that was reduced to possibly the Atkins-Kroll job and Umatic School, which you did not furnish the correct estimate. I believe there was one other—oh, the Bilmar Market I believe was the third one. What was the nature of the Atkins-Kroll job?

A. It was an addition of a salesroom on existing steel frame building, which was a covered roof and siding with corrugated asbestos cement.

Q. In other words, was there any sheet metal that went into that addition that was put on that building?

A. There were the gutters, down spouts and a certain amount of plumbing, all of which was ordered after the job was measured so there wasn't any occasion to return material.

Q. Where was the plumbing, gutters and down spouts ordered from?

A. It was picked up at Mr. Bogovich's place of business down in Asan.

Q. The metal shop? A. Yes.

Q. It was made to order?

A. It was prefabricated and we just measured up how much footage we needed and there would be no return on any material there.

Q. Would you have occasion to return any of the material used on the Umatic School job in view

(Testimony of C. W. Lerche.)

of the fact you were discharged before it was completed? [145]

A. There was a certain amount of forms, panels and other stuff that was returned during the time I was with Fisher Construction Company.

Q. It was returned to the warehouse, is that correct?

A. Yes and coming back to the Atkins-Kroll job there was very little cement work on the job; therefore there was no return of form lumber and the siding—that was all furnished by Atkins-Kroll outside of the contract price.

Q. Now going back to the windows that you ordered for Mr. Bogovich were those ordered before or after Mr. Fisher made the statement to you that he did not want any work done for Mr. Bogovich?

A. About three or four weeks before.

Q. Referring to Mr. Bitting's testimony that he saw you in an automobile down at Umatic drinking a beer with four BPM men, is that correct?

A. It probably is. It was on a Sunday. I was down there calling on the job and the job was going and the superintendent had two BPM men visiting him on the job for the day and I believe we had a bottle of beer in the automobile at lunch time.

Q. Referring to this valve that has been testified about here that was supposedly air-freighted in from Honolulu, do you know anything about the valve?

A. No, the only thing I can think of is that

(Testimony of C. W. Lerche.)

after the job was actually in progress there was a change made on one of the [146] down runners of the drain from the roof which required a valve.

Q. When would that change have been made in relation to the starting date of the job?

A. Just about at that time.

Q. Referring to the testimony on the Thomas Curran house did you have anything to do with that job?

A. Not until the day that Mr. Fisher came out here and received that letter. That was when he talked to me about as to what was taking place up there. Prior to that I had not even seen the job with one exception. Mr. Guy up there wanted me to advise him as to some material that was going into the job.

Q. At any time prior to the time Mr. Fisher called your attention to the job in March 1954 or subsequent to that date had Mr. Morrison questioned you concerning that job?

A. (Shakes head).

Mr. Crain: I have no other questions.

Cross Examination

Q. (By Mr. Turner): Is it true that you were asked to go up and look at the Curran job in the spring of 1954 and you came back and reported that it was all completed? A. No, sir.

Q. With reference to the valve that was brought out for the Cocos Island job, is it your testimony

(Testimony of C. W. Lerche.)

that this change was made just before the construction started? [147]

A. I am quite sure it was.

Q. Are you certain?

A. I am quite sure.

Q. Why did you order windows for Mr. Bogovich?

A. Because at that time Mr. Bogovich wanted to save time on construction and it was verbally conceded that we were to do the work at the time.

Q. But you didn't take this up with the office or anything—you just ordered the windows?

A. I took it up with Mr. Morrison and told him what we were going to do, that we were going to order the windows and Paul Bogovich would pay for them direct.

Mr. Turner: That is all I have.

Examination by the Court

Q. What is all this—you heard Mr. Morrison's and Mr. Fisher's testimony about the Umatic job, Mr. Lerche, about failing to take off large numbers of items and so forth? What is your version of that?

A. I concede that I may not have been high enough on my equipment rental that was set up for the job. It is my recollection that the only raise that was made in my estimate was the \$15,000 that Mr. Fisher added on to the price of my estimate.

Q. Now you heard the testimony about the—I

(Testimony of C. W. Lerche.)

call it weather stripping on the double doors, the failure to include [148] that in your estimate?

A. So far as my purchase order, at the time it was my understanding that was supposed to be furnished from a firm in Honolulu from whom we bought other items of metal at the time.

Q. I don't quite understand that. The criticism was that there weren't enough included to take care of all the double doors——

A. You issue an order to cover all the items in the specifications and miscellaneous items and it is my recollection that this was a miscellaneous item that was included in that specification for which order was sent to Honolulu.

Q. Because the specification was inadequate?

A. No, because Honolulu's interpretation of the specification was.

Q. Then what happened when you didn't get enough?

A. Same thing as happened on several other jobs—they come out short and then you have to go back and have them furnish the material, but in that case where it is definitely stated that it is an order in accordance with plans and specifications, I would construe that Mr. Fisher had a right to collect his air freight from the Honolulu concern who accepted the order.

The Court: Well, any other questions?

Mr. Turner: I wasn't quite clear—would he send the specifications to the company in Honolulu who was going to supply [149] the material?

(Testimony of C. W. Lerche.)

The Court: They ordered according to specifications and they read the specifications, according to his view, as calling for less material than that which they shipped and as a consequence they had to make up the deficiency by sending it air freight.

Mr. Crain: Is it my understanding that they ordered it out of Honolulu?

A. Not the Honolulu office.

Mr. Crain: In other words, who ordered those particular iron items? Did you order them from here?

A. Very likely; I can't remember the specific order now.

Mr. Crain: Would you order through the Honolulu office of Fisher or direct from the supplier?

A. Direct from the supplier.

Mr. Crain: But you would order them according to the specifications?

A. According to the plans and specifications and their bid of such and such a date.

Mr. Turner: A particular order wouldn't tell them how many to send you; it would just say "send according to specifications"?

A. That is right.

Mr. Turner: I have no other questions.

The Court: Very well, you may be excused, Mr. Lerche. [150]

Mr. Crain: Mr. Morrison, would you take the stand a moment please.

JAMES M. MORRISON

previously called as a witness by the plaintiff, was recalled as a rebuttal witness by the plaintiff and having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Crain): When you were previously on the stand weren't you questioned about the Curran house?

A. I don't know; I think so; I am not sure.

Q. I thought you were and I believe you testified at that time that you didn't know anything about that job.

A. I didn't know about it while it was going on. It was done prior to my time.

Q. Did you receive numerous complaints as mentioned in his letter? A. Yes, I did.

Q. What did you do with them?

A. I turned them over to Mr. Lerche.

Q. Did you get any report back from Mr. Lerche? A. Yes, I did.

Q. What was that report?

A. The report I had from him was that everything we were supposed to have done by our contract was completed. [151]

Q. Let me ask you—you heard Mr. Lerche testify as to how he would put an order in with a supplier in Honolulu. Is that the way ordering was usually done?

A. Not customarily. Occasionally you get bids from suppliers who have gone to the trouble of making a take-off of the materials themselves and they

(Testimony of James M. Morrison.)

will bid so many dollars to supply all the iron work for the job. However, that was not the case in this case.

Q. It was not?

A. No, they were ordered as individual items.

Q. Do you have those particular orders?

A. Yes—not with me. It never occurred to me they were going to be a matter of issue.

Q. But you have them?

A. Yes, certainly.

Mr. Crain: That is all. We submit the case, your Honor.

The Court: Argument?

Mr. Crain: We will waive argument.

The Court: The court finds the issues joined in favor of plaintiff against the defendant in cause of action No. 1 and finds judgment for the plaintiff in the amount of \$3,200 which represents 18 weeks at \$200 a week less \$400, which is Mr. Lerche's testimony as to what he earned in outside employment. I feel that the defendant is obligated by its contract under date of September 29, 1952, which employed Mr. Lerche for a period of [152] two years. While the defendant's testimony indicates that there were degrees of dissatisfaction with his work, the court certainly has to assume that as of February 1954, after he had been continuously employed by the firm since September 29, 1952 and when both the president and vice president of the Fisher Construction Company had familiarized themselves with his accomplishments or lack of

accomplishments, they were certainly on notice as to his qualifications and as to his abilities so that when in February of 1954 his salary was increased rather than his being discharged for past derelictions in the performance of his duty, the court must assume that his work in the main was not only satisfactory but that it was sufficiently satisfactory that it merited an increase in salary. Now, of course, construction work is highly competitive, and as Mr. Fisher and Mr. Morrison pointed out, it requires skill, training and understanding in order properly to figure a job in order to come out with a profit and that in the beginning, according to Mr. Morrison's testimony, a new firm oftentimes expects to lose money while it is getting established. If the Umatic job was as defective in the original estimates as was indicated here, it seems to me that the Honolulu office was in an excellent position to correct those lack of estimates. If Mr. Lerche had had the final say-so in the Umatic job, it's possible that he would have been quite delinquent, but he didn't. That was audited by Mr. Fisher, increases made, and further studies were made by [153] Mr. Morrison. Well, certainly such items as hardware should be apparent from those estimates. In the final analysis the court feels that what happened here is that Mr. Fisher got fed up and without reference to his obligation under his agreement to employ Mr. Lerche for two years, he terminated him arbitrarily, without notice; according to the testimony here without even giving him a week's pay or anything else—just said "You are through tonight." That isn't

what he said in his contract of September 29, 1952, and the court holds them to that contract. There being no further business to come before the court, we will stand adjourned except the counsel for the plaintiff will prepare findings of fact and conclusions of law and judgment and settle with the defendant within ten days if that is satisfactory.

(The court adjourned at 4:15 p.m., April 11, 1955.) [154]

[Endorsed]: No. 14842. United States Court of Appeals for the Ninth Circuit. Fisher Construction Company, Ltd., Appellant, vs. C. W. Lerche, Appellee. Transcript of Record. Appeal from the District Court of Guam, Territory of Guam.

Filed: July 14, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14842

FISHER CONSTRUCTION COMPANY, LTD.,
Defendant-Appellant,
vs.
C. W. LERCHE, Plaintiff-Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD ON APPEAL

Defendant-appellant, by its attorneys, hereby adopts as its Designation of the Record to be printed, the Designation of Record on Appeal filed in the District Court of Guam on the 11th day of July, 1955, and defendant-appellant further adopts as its points the Statement of Points filed in the District Court of Guam on the 11th day of July, 1955.

SPIEGEL, TURNER & STEVENS,
/s/ By GERALD G. WOLFSON,
Attorneys for Defendant-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 19, 1955. Paul P. O'Brien,
Clerk.